Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

92-1246

NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
2631 Telegraph Rd
P.O. Box 697
Flat Rock, MI

36 pp

QUESTIONS PRESENTED

I.

Does the Constitution require courts to strictly scrutinize claims of racial preferences used to terminate tenured public faculty?

II.

Does the Constitution require pre-or post-termination notice of the use of a racial preference in the selection of tenured public faculty for termination?

III.

Does Federal Rule of Civil Procedure 56 authorize a trial court to determine credibility on a motion for summary judgment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE:

A. Statement of the Claim.....3

B. Facts and Background.....3

C. Decisions Below.....14

REASONS FOR GRANTING THE PETITION:

I. THE SIXTH CIRCUIT'S FAILURE TO ADDRESS THE ISSUE OF RACIAL PREFERENCE IN PETITIONERS' TERMINATION FROM TENURED FACULTY PUBLIC EMPLOYMENT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY A DISTRICT COURT, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION TO REQUIRE THE APPLICATION OF STRICT SCRUTINY REVIEW TO THE USE OF RACIAL PREFERENCES UNDER THIS COURT'S DECISION IN *WYGANT, supra.*, AND *RICHMOND V. CROSSEN CO.*, 488 U.S. 469 (1989).....17

A. Under ***Wygant, supra.***, The Claim Of Financial Exigency Cannot Not Rise To The Level Of A Compelling Governmental Interest Sufficient To Justify The Use Of Racial Preferences To Terminate Tenured Public Faculty.....21

II. THE SIXTH CIRCUIT'S UPHOLDING OF THE LEVEL OF DUE PROCESS ACCORDED PETITIONERS SIGNIFICANTLY DEPARTS FROM MANY DECISIONS OF THIS COURT, INCLUDING, THIS COURT'S HOLDINGS IN *PERRY V. SINDERMANN,* 408 U.S. 593 (1972), *CLEVELAND BOARD OF ED. V. LOUDERMILL,* 470 U.S. 532 (1985), *MCDONALD V WEST BRANCH,* 466 U.S. 284 (1984) AND NEARLY ALL OTHER CIRCUITS.....22

A: This Court should rule, in support of Wygant, that the 14th Amendment requires that when race is a basis to select a tenured public employee for lay-off and/or termination, the employee is entitled to notice of how race was used in the selection, and an opportunity to respond to the process used.....22.

III. FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT AUTHORIZE THE TRIAL COURT TO DETERMINE CREDIBILITY..... 29

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases:

Adickes v Kress & Co
398 U.S. 144 (1970).....29

Anderson v Liberty Lobby, Inc.
477 U.S. 242 (1986).....29

Bignal v. North Idaho College
538 F2d 675 (9th Cir. 1976).....28

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985).....22, 26, 27

Fullilove v. Klutznick
448 U.S. 448 (1980).....18

Graham v. Richardson
403 U.S. 365 (1971).....18

Johnson v Board of Regents,
510 F2d 975 (7th Cir., 1975).....28

Johnston-Taylor v. Gannon,
907 F.2d 1577 (Sixth Cir. 1991).....1

Johnston-Taylor Et. Al. v. Gannon Et. Al.
(91-2398 Sixth Cir. 1992).....1

Krotkoff v. Goucher College,
585 F2d 675 (4th Cir. 1978).....28

Loving v. Virginia,
388 U.S. 1 (1967).....18

McDonald v. West Branch
424 U.S. 284 (1984).....14, 22, 27

Palmore v. Sidoti,
466 U.S. 429 (1984).....18

Perry v. Sindermann,
408 U.S. 593 (1972).....22

Texas Faculty Ass'n v University of Texas at Dallas
946 F2d 379 (5th Cir. 1991).....28

Wygant v. Jackson Board of Edcuation
476 U.S. 267 (1986).....16, 20, 21, 22, 23, 25

Whitsel v. Southeast Local School District,
484 F.2d 1222 (6th Cir. 1973) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. Amendment V.....2

U.S. Const. Amendment XIV.....2

28 U.S.C. 124(1).....3

42 U.S.C. sec. 1983.....2

Title 18 U.S.C sec. 3231 (a)(3)(4).....3

Rule 12(b)(6).....14

Petitioners, **Sallie Elizabeth Johnston-Taylor, individually and as Administratrix of the Estate of Edward Taylor, David Arganian, and Lillian Arganian**, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported as *Johnston-Taylor v. Gannon*, 907 F.2d 1577 (6th Cir. 1990), and is reproduced at pages 11-23a of Appendix **I**, and the unpublished second opinion of *Johnston-Taylor v. Gannon*, 91-2398 United States Court of Appeals for the Sixth Circuit, is reproduced at pages 2-10a of Appendix **I**. The Sixth Circuit Court of Appeals Order denying Rehearing is published at page 1-a of Appendix **I**. The unpublished district court opinion granting summary judgment dated April 24, 1989 is reproduced on page 49-82a, Appendix **I** and the unpublished district court opinion, dated November 14, 1991 on remand from the Sixth Circuit is reproduced at pages 24-48a of Appendix **I**. The unpublished opinion of the district court denying Respondents Rule 12 (b) (6) motion is reproduced at pages 83-99a of Appendix **II**. The unpublished opinion of the Michigan circuit court is reproduced at page 100-117a of Appendix **II**.

JURISDICTION

The Sixth Circuit Court of Appeals Opinion in this matter was filed on September 2, 1992. A timely Petition for Rehearing was filed on September 16, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on October 20, 1992 and is set forth in Appendix I 1a. This Court's jurisdiction is invoked under Title 28, U.S.C. section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

It is also based on the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, which provides in pertinent part:

> "No person shall be...deprived of life, liberty, or property, without the due process of law."

The principal statutory provision involved is 42 U.S.C sec. 1983 (1978), which provides in pertinent part that:

> [e]very person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State...causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

STATEMENT OF THE CASE

The United States District Court, Western District of Michigan, Southern Division, had jurisdiction pursuant to Title 18, U.S.C. section 3231 (a)(3)(4); 28 U.S.C 124 (1), 42 U.S.C. 1983.

A. Statement Of The Claim.

This case presents a constitutional challenge to the use of racial preferences, under the rubric of "affirmative action," during a reduction in force termination of tenured professors from a public college. It challenges the lack of any pre-termination notice of the use of race, and no hearing on the issue as a result. It challenges the Sixth Circuit's failure to apply a strict scrutiny analysis to the use of race in the termination of Petitioners' public employment.

B. Facts and Background.

In June 1967 Petitioner David Arganian was awarded an unrestricted grant of tenure prior to the college collective bargaining agreement taking effect. Under the collective bargaining agreement he possessed continuing contract tenure, as did Petitioner Taylor. At the time of their termination, Petitioner Arganian had 22 years seniority and Petitioner Taylor had 17 years. Taylor was also the faculty union president. The district court and Sixth Circuit found that

Petitioners had a property interest in their tenured faculty employment and were entitled to procedural and substantive due process.

The Alleged Financial Exigency: In March 1983 Respondent college contracted to purchase $500,000 of high tech equipment. The Board of Trustees scheduled a June 1983 millage to raise $610,000 to pay for the equipment. The millage failed. The administration requested the faculty and staff to take a 3% pay concession. The administration threatened to terminate staff if the employee unions refused to make the concession. The unions refused to reopen the contracts claiming that there was insufficient evidence of a financial crisis. The unions offered numerous cost savings proposals sufficient to pay for the equipment, but they were rejected by the administration because they were not pay concessions. College President Gannon then ordered the divisional deans to select people for termination.

Termination of Petitioners: On July 22, 1983 the Board of Trustees voted to terminate twenty-two faculty and staff, including Petitioners, effective forty five (45) days thereafter, on September 6, 1983. The terminations came at the beginning of the new fiscal year and were based upon an alleged "projected" revenue short fall of 1.1% of a 30 million dollar budget. No budget deficits existed in prior years.

Petitioners' termination letters stated only that they

had been selected for termination due to a financial exigency [Appendix II, 120a]. At no time prior to their termination did the college notify Petitioners that they had been selected for termination on the basis of racial preference, nor were they informed of that fact in any grievance meeting with any administrative official, nor at arbitration. Petitioners did not know how the dean had used race and affirmative action to select them for termination until five years later during discovery in this case.

The Monday following the Friday Board meeting to terminate faculty, Petitioner Arganian met with his department chairperson to find out why he had been selected for termination. The chairperson testified that he did not know the actual reasons, as he was not "privy" to the process, and therefore he could only "speculate" on the reasons for Arganian's selection. [Deposition of Anderson 35, 131-132]. Dr. Anderson never mentioned how race or affirmative action affected Petitioner Arganian.

Both Petitioners met with the personnel director to discuss when to turn in their keys and when their pay and benefits would end. At his meeting, Petitioner Arganian demanded to know how and why he had been selected for termination, as he was a high seniority faculty with an independent grant of tenure. The personnel director would not discuss his independent grant of tenure. He would only

discuss generally, but not get "specific," about the three categories used by Petitioner's dean to select the faculty in his division for termination [District Court Evidentiary Transcript 250-251]. The categories were: declining enrollment, full to part-time ratios, and a faculty member's student-administrative evaluations, which he chose from a list of "14 points" given to the dean [Appendix I 38a]. The personnel director never mentioned that the dean used a fourth category, which was race or affirmative action in making his selection of faculty to terminate.

Petitioners filed grievances alleging violations of the collective bargaining agreement and demanding their due process rights. On August 25, 1983 the college attorney met with the union attorney to discuss how the grievance process was to be implemented. Petitioners were not requested to attend, but did so.

The personnel director testified that Petitioner Arganian's attorney was barred from the meeting under the threat of removal by the campus police [Evidentiary Hearing Transcript 263-264, 414-415]. Again no written statement of the reasons, process, or data used by the dean to select Petitioners for termination was given to Petitioners at that meeting. No mention of the use of race or affirmative action ever came up at that or at any other grievance meeting with administrators. Petitioners had no notice, constructive or

otherwise, to know what role race played in their individual selection for termination.

Petitioners and their union representative requested the information and calculations used by the dean to rank them by their performance evaluations. The union attorney and labor representative demanded documents relied on by the college to establish a claim of financial exigency. Little, if any, of the requested financial data was provided prior to the effective date of Petitioners' terminations. The Petitioners' union filed an unfair labor practice charge in December 1983, complaining that the college refused to provide the union with the financial data. Five years later, during discovery in this case, Respondents belatedly provided some of the faculty rankings, but they have never released the dean's calculations of how he ranked the faculty.

Petitioners were not afforded any pre-termination or post-termination "hearing" before either their divisional dean, who had selected them for termination, or the Board of Trustees, who voted to terminate Petitioners on July 22, 1983. Respondent college admitted that it gave Petitioners no pre-termination due process hearings for Petitioner Arganian's unrestricted grant of tenure nor Petitioners' continuing contract tenure.

> "Defendants admit that Plaintiff Arganian has never been notified by any officer or agent of LCC that his tenure has been terminated nor has Arganian been

afforded a hearing on his tenure prior to his being terminated as a full-time professor." [Answer to Complaint, paragraph 22].

In its Answers to the First Set of Interrogatories the college further admitted:

> **INTERROGATORY: No. 59.** "Did Lansing Community College or any of its agents provide Plaintiff Arganian or Plaintiff decedent Edward Taylor with any form of a hearing prior to their layoff or termination? If yes, please provide a detailed statement as to the form of the hearing and/or any notice of such rights or hearing. If no, state the reasons why Plaintiffs' Arganian and decedent Taylor were not given a notice and a chance for a hearing prior to their lay off or termination."
>
> **RESPONSE:** "Neither the College nor its agents provided Plaintiff David Arganian or Edward Taylor a hearing prior to their layoff, **nor were they entitled to any such hearing prior to their layoff**." [Emphasis added] (Answers to First Set of Interrogatories R-128].

In September 1983, Petitioner Arganian filed suit in the Ingham County Circuit Court of Michigan and received a temporary restraining order to prevent his termination from taking effect. His suit was to compel the college to divulge how he was selected; the specific reasons and data used for his selection for termination; and to compel the college to hold a due process hearing; or in the alternative, award damages for violations of his constitutional rights of procedural and substantive due process. Respondents petitioned the court to dissolve the restraining order and filed a motion

for summary judgment. Respondents alleged Petitioner was not entitled to any due process under a reduction in force.

The state circuit court issued an order staying all of Petitioner Arganian's discovery requests, over the objections of Petitioner's attorney [Appendix **II** 118a]. Seven months later the court dismissed Petitioner's complaint without prejudice. The court ruled that Petitioner's constitutional pre-termination due process claims were not "ripe" until after the grievance procedure had run its course through arbitration. [Opinion of the court, Appendix **II** 105a].

Both Petitioners filed grievances under the collective bargaining agreement prior to their termination taking effect, but arbitration did not occur until over a year after their terminations. The arbitrator specifically ruled that he was not considering any of Petitioner's statutory or constitutional claims and limited his decision to the "four corners" of the collective bargaining agreement. Race was not an issue in the arbitration proceedings because Petitioners did not discover the extent race played a part in the selection process until November 1988. The arbitrator's decision was issued on December 19, 1984.

Affirmative Action And The Use Of Race To Terminate Petitioners:

The college's first statement that affirmative action had been a factor in Petitioner Arganian's termination was

in response to Petitioners' grievances, four months after the termination had taken effect. In answer to his grievance the college stated to Petitioner Arganian:

> "The person with the next highest performance evaluation within the Western Civilization Program does have less service, but is also a minority.
>
> For these reasons you were affected by the reduction in force plan. The Master Agreement was not violated in this process." [Portion of a Letter to David Arganian, November 23, 1983, from Ron Dove, personnel director, page 6, Defendants Exhibit P]

Enclosed with the letter was the "14 points" given to the deans of the college to review programs for possible termination of faculty and staff. [Appendix I 38a]. The "14 points" included the phrase "affirmative action," but no statement was ever produced by Respondents, or given to Petitioners, which defined what "affirmative action" meant, or how it was to be defined or applied to the selection of Petitioners for termination.

Petitioner Taylor committed suicide on February 5, 1986, "allegedly due to depression over his dismissal". [Appendix I 15a].

Petitioner Arganian and the estate of decedent Taylor filed suit in federal court alleging, among other things, that the college violated their procedural and substantive due process rights. During discovery, Petitioners learned that race had been used in their selection for termination. The

deposition testimony of Petitioner's dean revealed that minorities were exempt from termination. He testified that only the "affirmative action" phrase on the list of "14 points" was defined for him by the administration:

> "The only exception would be that it was clear, because of affirmative action, **blacks and other minorities would not be laid off**." (Emphasis added) [Deposition of Sam Kintzer, p. 33].

The other deans in the college reviewed programs and selected the lowest senior faculty members to terminate. Petitioners' dean rejected seniority, and used subjective student and administrative evaluations to select the faculty to terminate from those programs he recommended for staff reductions. Petitioners' dean selected three white males over the age of fifty to terminate. The Respondents have never divulged the numerical calculations used by the dean to rank faculty. The district court refused to rule on two motions by Petitioners to compel production of these numbers.

Among the allegedly lowest ranked faculty in the Humanities department, were Petitioner Arganian and a black colleague, Dr. Taperia Chiwocha, who had 12 years seniority, compared to Petitioner, who had 22 years of seniority. Petitioner had one of the highest seniority rankings in the college.

Petitioners' chairpersons met with Dean Kintzer before he made his selection of faculty to terminate. Petition-

er Arganian's chairperson, Dr. Joseph Anderson, testified that among the lowest ranked faculty by student and administrative evaluations, one was black and not therefore considered because of his race.

> "My understanding at the time is that one of the qualifications or one of the criteria was affirmative action and that, therefore, Dr. Chiwocha was not being considered or would not have been considered because of his race." [Deposition of Anderson, pp. 25-26].

Petitioner Taylor's chairperson testified that he told the dean that the factors he was using to select people for termination "pointed to others in the department more strongly than" Petitioner Taylor. [Deposition of Dr. William Heater, pp, 25, 165-166]. The dean testified that those recommendations were not acceptable because one would have been a "for cause" termination, and the other person was black and that person "would have been covered by the affirmative action issue." [Deposition of Kintzer p. 46].

The personnel director also testified as to the use of race in the selection process.

> "Well, if we had a particular department where there was just one minority, we probably wouldn't lay that one minority off in consideration of all the other criteria that was being considered. That would be a consideration in line with the 14 criteria." [Deposition of Dove p. 86].

The personnel director also testified that President Gannon approved Dean Kintzer's "methodology and approach." [Deposition of Dove, p. 49].

Petitioner Taylor's department had several minority faculty, one of whom the chairperson had recommended for termination because that person fit the dean's selection factors. The dean specifically rejected that person because of race and affirmative action [Deposition of Kintzer p. 46].

Respondent's own affirmative action plan specifically rejects the use of race in staff reductions. It states, in part, that:

> "All other personnel actions, including but not limited to compensation, **staff reductions**, promotion, social and recreational programs, will be administered without regard to religion, **race, color,** national origin, age, sex, height, weight, marital status, handicap unrelated to job or position, or any other category protected by law." [Emphasis added, p. 4].

The labor agreement is silent on the use of race during a reduction in force. The only mention of affirmative action in the selection for termination was in the undefined and unranked "14 point" list given to the deans. Aside from the testimony of the dean and personnel director, which came five years after their terminations, Petitioners have never been given an oral or written statement as to how race and affirmative action was applied to select them for termination.

Respondents' affirmative action plan is not the result of any judicial or administrative finding of past discrimination. It contains no admission by the college of any past

discrimination. The college's own minority utilization study shows that there was no minority under utilization in Petitioners' division at the time of the terminations.

The Respondents have never articulated a reason why they had to categorize the faculty by race, exempt blacks and other minorities from termination, or apply "affirmative action" to an alleged economic reduction in force.

B. Decisions Below.

On April 13, 1987 the district court, ruling on Respondents Rule 12(b)(6) motion, ruled that Petitioners had stated a claim for violation of their procedural and substantive due process, and rejected Respondents' assertion that the grievance/arbitration process equaled due process, relying on *McDonald v. West Branch* 424 U.S. 284, (1984) [Appendix I 95a]. On April 24, 1989 the district court granted Respondents' motion for summary judgment. The district court awarded summary judgment to Respondents, holding that Petitioner Arganian's independent grant of tenure had merged into the labor agreement and that Petitioners had received due process under the terms of the grievance/arbitration procedure of the labor agreement [Appendix I 61a].

On appeal, the Sixth Circuit reversed the district court's grant of Respondents' motion of summary judgment. The Sixth Circuit stated that:

> "[t]he district court incorrectly determined that Arganian's tenure rights had coalesced into the rights of continuing contract. There is simply no legal foundation for this holding by the district court." [Appendix I 20a].

The Sixth Circuit specifically rejected the district court's holding "that the grievance procedure specified in the collective bargaining agreement satisfied due process," concluding that Petitioners were not afforded:

> "all the process due them... because they never had the opportunity to challenge grounds for their dismissal prior to their discharge...."[Appendix I 20a].

The Sixth Circuit also held that the:

> "professors did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings; the arbitrator never decided the issue of financial exigency. Thus, [they]...never had a sufficient opportunity to challenge the grounds for their dismissal, including the existence of the alleged financial exigency. [Appendix I 22a].

The Sixth Circuit remanded for an evidentiary hearing on "the validity of the procedural due process provided to them, [and] whether the criteria used by the dean had a rational basis," and "whether [an] exigency in fact existed." [Appendix I 20-21a]. The Sixth Circuit made no mention of the use of race in the selection criteria, even though Petitioners briefed the matter for the Sixth Circuit, and emphasized it at oral arguments.

After an evidentiary hearing on Respondents' motion

for summary judgement, the district court again granted Respondents summary judgment. The district court dismissed Petitioners' cross motion for summary judgment. Petitioners' cross motion for summary judgment was based upon Respondents admissions that no pre-termination due process hearing had been held and that Petitioners were terminated on an improper use of race and affirmative action. The district court did not address Petitioners' allegations of racial preference termination.

On the second appeal, the Sixth Circuit upheld the district court's grant of summary judgment, holding that Petitioners had received due process and that the factors used by the dean to select Petitioners for termination had a "rational basis." The Sixth Circuit did not analyze Petitioners' Equal Protection claim, and dismissed it as being "without merit." [Appendix I 10].

Petitioners request that this honorable Court review and reverse the opinion of the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

The facts of this case give the Court an opportunity to reaffirm the constitutional principals enunciated in *Wygant v. Jackson Board of Education*, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986), in the context of the due process procedures required to ensure adequate pre-termination notice and hearing and post-termination due process to

challenge the use of race to terminate tenured public faculty.

I. THE SIXTH CIRCUIT'S FAILURE TO ADDRESS THE ISSUE OF RACIAL PREFERENCE IN PETITIONERS' TERMINATION FROM TENURED FACULTY PUBLIC EMPLOYMENT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY A DISTRICT COURT, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION TO REQUIRE THE APPLICATION OF STRICT SCRUTINY REVIEW TO THE USE OF RACIAL PREFERENCES UNDER THIS COURT'S DECISION IN *WYGANT, supra.*, AND *RICHMOND V. CROSSEN CO.*, 488 U.S. 469 (1989).

The Sixth Circuit's opinion of September 2, 1992 simply dismissed Petitioners' equal protection claim of a racial preference termination without any application on the record of the strict scrutiny analysis required by this Court in *Wygant, supra.* The Sixth Circuit's opinion merely stated: "Plaintiff's equal protection and free speech arguments are without merit." [Opinion p. 6, Appendix I 10a].

Petitioners' briefs and oral arguments before the Sixth Circuit outlined to the court the similarities of Petitioners' claim and the fact situation in *Wygant, supra.*[1] As in

---

[1]. Counsel for Petitioners was an attorney before this Court on the *Wygant* case, and therefore is familiar with the unique facts and circumstances in both of these cases. Counsel informed the

Wygant, supra., higher seniority whites were laid off, and less senior minorities were retained. In this case, as in, *Wygant, supra.*, minorities were exempt from layoff under a claim of financial exigency. In this case, no court at any level has analyzed Petitioners' equal protection claim of unlawful racial preference terminations of publicly employed tenured faculty.

In *Wygant, supra.*, this Court restated its requirement that: "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'" at 274-5, citing *Fullilove v Klutznick* 448 US 448, 491, 65 L Ed 2d 902, 100 S Ct 2758 (1980). This Court required a two pronged examination: **1.)** Any racial classification "must be justified by a compelling governmental interest, (citing: *Palmore v Sidoti*, 466 U.S. 429, 432. 80 L Ed 2d 421, 104 S Ct 1879 (1984); see *Loving v. Virginia*, 388 U.S. 1, 11, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); cf. *Graham v Richardson*, 403 U.S. 365, 375, 29 L Ed 2d 534, 91 S Ct 1848 (1971) (alienage); and **2.)** "the means chosen by the State to effectuate its purpose must be "narrowly tailored' to the achievement of that goal.'" (citing *Fullilove, supra.* at 480).

Sixth Circuit of this at oral argument to aid them in their analysis and application of the appropriate tests to the facts in this case.

The Sixth Circuit has simply ignored this requirement of strict scrutiny judicial review, or even the need for judicial inquiry when the issue of race has been raised. By failing to deal with the issue, the Sixth Circuit has sanctioned racial preference terminations of tenured public faculty, in the absence of any compelling government purpose.

Respondents have offered no reason, argument, or even alleged, a compelling governmental interest which would allow Respondents to categorize the faculty by race, exempt minorities from termination, and select Petitioners for termination on the basis of racial preferences. The deposition testimony shows that Petitioners were terminated under the rubric of "affirmative action," in the absence of any articulated and compelling need for remedial affirmative action.

In this case, the college clearly violated its own affirmative action plan. That plan requires that reductions in staff be "administered without regard to...race, [or] color...." Moreover, the College's Affirmative Action Plan's Utilization Analysis clearly showed that minorities were not under utilized in Petitioners' division. The entire burden of whatever purpose Respondents had in using racial preference terminations is born entirely by the Petitioners.

Exempting minorities from layoff in the Petitioners' division was totally irrelevant to any legitimate public

purpose, and totally irrational. At no time in this case have Respondents identified any purpose to justify excluding minorities from termination. Therefore, there can be no finding that the purpose behind the racial preference, 'transcended' the harm to Petitioners.

Unlike *Wygant, supra.*, the Respondent's were not following any collective bargaining agreement provision, or Affirmative Action Plan, but merely excluded minorities from lay-off under the rubric of "affirmative action." Respondents have made no attempt to cloak their use of racial preference termination with any form of legitimacy.

Respondents "affirmative action" rubric was not based upon a finding of any past discrimination, nor has any agency competent to do so, found that Respondents discriminated in the past. The Colleges' Affirmative Action Plan contains no admission by the College of any past discrimination against minorities. Nor does it contain any findings that would justify any claim of remedial use of race to achieve a compelling governmental objective.

As in *Wygant, supra.*, Respondents have no evidentiary support to conclude that any remedial affirmative action was necessary. Respondents merely assert that the undefined statement "affirmative action" was on the list of "14 points" given to the deans, and that alone justified the dean's use of racial preference to terminate senior tenured faculty. This

constitutes an extreme and flagrant misuse of racial preferences under the rubric of "affirmative action."

A. Under *Wygant, supra.*, The Claim Of Financial Exigency Cannot Not Rise To The Level Of A Compelling Governmental Interest Sufficient To Justify The Use Of Racial Preferences To Terminate Tenured Public Faculty.

The failure of the Sixth Circuit to perform the required strict scrutiny analysis of Respondents' use of race seriously departs from this Court's requirement that courts do "a most searching examination" into the use of race, as in this case, to terminate tenured faculty employment. *Wygant, supra.*, at 273. The claim of an alleged financial exigency simply cannot rise to a compelling governmental interest sufficient to terminate tenured faculty on the basis of race, simply because it is irrelevant to the use of race.

This Court has placed the burden of proving a compelling governmental interest sufficient to classify people by race on the Respondents, *Wygant, supra.* at 274. Respondents have never attempted to meet this burden or even present a defense to this issue. The Sixth Circuit's failure to analyze this case by the standards articulated by this Court in *Wygant supra.* have relieved Respondents from the onerous burden of proving that their racial preference terminations are justified under the law.

The Sixth Circuit's refusal to deal with this issue

requires this Court's intervention to reaffirm the requirement that courts must apply strict scrutiny analysis to the use of racial preference terminations to protect innocent victims from misguided governmental use of race under the rubric of "affirmative action."

II. THE SIXTH CIRCUIT'S UPHOLDING OF THE LEVEL OF DUE PROCESS ACCORDED PETITIONERS SIGNIFICANTLY DEPARTS FROM MANY DECISIONS OF THIS COURT, INCLUDING, THIS COURT'S HOLDINGS IN *PERRY V. SINDERMANN*, 408 U.S. 593 (1972), *CLEVELAND BOARD OF ED. V. LOUDERMILL*, 470 U.S. 532 (1985), *MCDONALD V WEST BRANCH*, 466 U.S. 284 (1984) AND NEARLY ALL OTHER CIRCUITS.

A: This Court should rule, in support of Wygant, that the 14th Amendment requires that when race is a basis to select a tenured public employee for lay-off and/or termination, the employee is entitled to notice of how race was used in the selection, and an opportunity to respond to the process used.

Petitioners contend that inherent in the principles articulated by this Court in *Wygant, supra.*, there is the requirement that Petitioners be given adequate notice and a meaningful opportunity to challenge the use of racial preference terminations under affirmative action before being terminated from their tenured faculty positions. This Court has not addressed the standard of due process required to protect people terminated under an alleged application of

affirmative action in an economic layoff situations.

Petitioners claim they are entitled to pre-termination written notice of how race and affirmative action was used to select them for termination, and, at the very least, a meaningful hearing before the person using the racial criteria to terminate them, in order to challenge the application of race prior to being terminated.

Because of the odious nature of racial preference terminations, such notice must be in writing and articulate the specific purpose for which race is being used, and how the use of race was applied to select Petitioners for termination. This requirement ensures a record for later judicial review, if necessary, and protects Petitioners from disingenuous attempts by Respondents to claim later that notice was given in the absence of any documented proof of that fact. Respondents have simply never taken the use of race based terminations of tenured public faculty with the seriousness this Court intended in its *Wygant, supra.*, and *Croson, supra.* decisions.

The facts of this case present this Court an opportunity to define the standards of due process notice and hearing necessary to protect tenured public faculty from racial preference terminations under a claim of financial exigency. In *Wygant, supra.*, the racial preference termination formula was part of the collective bargaining agreement and all

teachers had access to the district wide seniority list so that each teacher knew exactly how they would be affected by the race based lay-off language of the contract.

Petitioners had no pre-termination knowledge that their terminations were affected by the application of race and affirmative action. "Affirmative action" was merely listed on the "14 points", as an undefined category. None of the administrators Petitioners met with ever mentioned that it had been applied to them, or that it was being used to achieve some compelling governmental interest. There was simply no notice how it was used to terminate Petitioners until **after** all of the alleged due process "hearings" had been held.

The Sixth Circuit, in upholding the district courts finding that Petitioners had been afforded all the process due them, said:

> "On November 23, **following the hearings**, Arganian and Taylor received a detailed written explanation for their layoffs." (Emphasis added) [Appendix I 5a].

Nearly three months after his termination, Petitioner Arganian first learned that the dean had applied affirmative action to his selection when Respondents answered Petitioners grievances. Respondents' answers to Petitioners' grievances were the first written statements supplied to Petitioners offering some explanation of how they had been terminated. The November 23, 1983 letter was only a limited

response to the specific allegations contained in Petitioners grievances. Even then, Petitioner Arganian had no specific knowledge as to how the dean used affirmative action.

At the time, Petitioner was trying to schedule depositions to find out why he had been terminated. Respondents obtained a court order staying all discovery [Appendix **II** 118-119]. At that point, Respondents had effectively denied Petitioner pre-termination notice of the use of race in his selection and had blocked access to all post-termination forums to challenge the use of race in his selection, including judicial review, as the circuit court had Respondents motion for summary judgement under review for the next seven months.[Appendix **II** 100a].

The arbitration hearing was held over a year after Petitioners' termination. The arbitrator specifically stated that he was not ruling on any of Petitioners' constitutional and statutory claims. He also refused to consider Petitioner's independent grant of tenure, on the objection of Respondents.

It was not until Petitioners filed their 42 U.S.C. 1983 action against Respondents did they learn the extent race and "affirmative action" had played in their terminations.

Petitioners contend that it would not be an intrusive due process requirement for this Court to extend the principles of *Wygant, supra.,* to require employers who use race or affirmative action in the termination of public employment

to state in writing with specificity: 1.), the compelling governmental interest that racial preference is being used to further; 2.), how racial factors, or affirmative action, was being used to achieve that purpose; and 3.), how race or affirmative action is being applied specifically to the persons affected. This would afford Petitioners with specific written notice of the use of race or affirmative action, and facilitate judicial review of allegations of unlawful use of race in termination situations, especially during economic reductions in force.

The district court noted that the Sixth Circuit has not provided any guidance on the due process standards required for the termination of tenured faculty under a claim of financial exigency. [Appendix I 31a]. The district court adopted the *Loudermill, supra.*, standard and stated that Petitioners were entitled to even "less due process than Loudermill received." [Appendix I 33a].

The district court based its reliance on *Loudermill, supra.*, on the mistaken belief that Petitioners had available post-termination due process through arbitration and judicial review [Appendix I 33-34]. The district court failed to disclose in its analysis of Petitioner's due process rights that the court itself had foreclosed discovery of Petitioners equal protection claim by court order, and thereby foreclosed any judicial review of the use of race in any earlier forum or

judicial proceeding.[2] Many years of litigation could have been avoided by a simple and basic due process notice requirement for an employer seeking to use race in the termination of tenured faculty.

The Sixth Circuit did not adopt the *Loudermill, supra.*, standard, nor did it adopt the standard outlined in *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973), which the Sixth Circuit cited to reverse the district court's first grant of Respondents' motion for summary judgment. The Sixth Circuit did not apply any balancing test as required in *Loudermill, supra.*, in determining what pre-termination due process Petitioners are entitled to.

Petitioners did not get any post-termination due process at all. This Court has ruled that an arbitration proceeding under Michigan law, does not satisfy due process, or take the place of judicial proceedings under 42 U.S.C. 1983. *McDonald v West Branch, Mich.* 466 U.S. 284, 104 S Ct. 1799, 80 L. Ed 2d 302 (1984).

The vast majority of the Circuits, in cases of alleged

---

[2]. Petitioner Arganian introduced into evidence at the evidentiary hearing of March 1991 one hundred and seventy six pages of documents from Petitioners suit in the Michigan circuit court to prove that he had attempted to compel the college to divulge the reasons and data Respondents were using to terminate him, and to remind the court that it had barred all discovery during the period he might have had any meaningful post-termination due process hearings.

financial exigency, have held that the employer has the burden to show that the financial exigency was demonstrably bona fide; and that tenured faculty are entitled to have uniform and objective standards used to select faculty for lay off; to pretermination written notice of the reasons used to select and the employer's evidence; to time to prepare a defense, and a to meaningful opportunity to present their side of the story. *Johnson v Board of Regents*, 510 F2d 975 (7th Cir. 1975), *Krotkoff v Goucher College*, 585 F2d 675 (4th Cir. 1978); *Bignal v North Idaho College*, 538 F2d 243 (9th Cir 1976); *Texas Faculty Ass'n v University of Texas at Dallas*, 946 F2d 379 (5th Cir 1991).

There is absolutely no court in this country that has condoned or approved of the termination of tenured faculty when the alleged deficit is only 1.1% of a projected resource budget of over $30 million.

Petitioners' rights to notice of the use of race and the underlying data used by the dean to select them for termination is especially important in this case. This is especially critical where objective standards, such as seniority, are ignored if favor of subjective student and administrative evaluations. Respondents are, in effect, using an alleged claim of financial exigency to rid the college of faculty they cannot terminate under the more rigorous standards of a 'for cause' termination.

III. FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT AUTHORIZE THE TRIAL COURT TO DETERMINE CREDIBILITY.

Petitioners have not waived jury trial. However, the district court did not hesitate in ruling that Petitioner Arganian's testimony that personnel director Dove could not give him the real reasons he was terminated because his attorney was present, was not credible.

This Court set forth the standard for granting a motion for summary judgment in a civil rights case in *Adickes v Kress & Co.*, 398 U.S 144, 26 L.Ed 2d 142, 90 S Ct 1598 (1970). In *Adickes, supra.*, This Court reaffirmed that the moving party under Rule 56, continues to carry the burden to prove the absence of a material fact in order to be entitled to summary judgment, even if no opposing evidentiary matter is presented.". *Adickes, supra.*, 398 U.S. at 159. Adickes alleged a conspiracy to violate civil rights under 42 U.S.C 1985. This Court ruled that the moving parties affidavits were insufficient because "of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service,..." *Adicks, supra.*, 398 U.S. 157. This Court has made it abundantly clear that credibility is for the jury. In *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed 2d 202, 106 S.Ct. 2505 (1986), this Court stated:

"It by no means authorizes trial on affidavits. Credibility

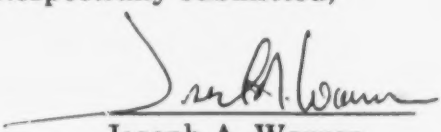
> determinations, the weighing of legitimate inferences from the facts are jury functions, not those of a judge...the evidence of the non-movant **is to be believed**, and all justifiable inferences are to be drawn in his favor." *Anderson, supra.,* p.254 (emphasis added)

Defendants, on the eve of the evidentiary hearing in March 1991, amended their Answer to Interrogatory 59, which had admitted that Respondents had not given Petitioners any due process hearings because they were not entitled to one. They now claim that they accorded Petitioners hearings. Petitioners respectfully submit that they are entitled to have a jury determine when respondents when Respondents were telling the truth.

CONCLUSION

The decision below squarely conflicts with decisions of other circuits as well as those of this Court. The issues herein are of vital concern, both to the nation as a whole as well as individual victims of discrimination, including the Petitioners. For these reasons, Petitioners respectfully urge this Court to grant the Petition.

Respectfully submitted,



Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney for Petitioners

92-1246

JAN 15 1993
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR,Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX I (pages 1-82)

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
26316 Telegraph Rd
P.O. Box 697
Flat Rock, MI 48134

TABLE OF CONTENTS

Page

Order Denying Petition For Rehearing.....1-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(Sixth Circuit).....2-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(Sixth Circuit).....11-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(W.D. Mich, Hon. Robert Holmes Bell).....24-a

Johnston-Taylor, Et. Al., v. Gannon, Et. Al.,
(W.D. Mich, Hon. Robert Holmes Bell).....49-a

No. 91-2398

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SALLIE ELIZABETH-TAYLOR, ETC.,ET AL.,
Plaintiffs-Appellants,

v. **ORDER**

PHILIP J. GANNON, ETC., ET AL.,
Defendants-Appellees.

BEFORE: MARTIN and JONES, Circuit Judges: and FEIKENS,[1] Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____

Leonard Green, Clerk

Filed October 20, 1992

---

[1]. The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

NO. 91-2398
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNSTON-TAYLOR, ET AL.,
Plaintiffs-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

v.

GANNON, ET AL.,
Defendants-Appellees
_____/

BEFORE: MARTIN and JONES, Circuit Judges; and FEIKENS, Senior District Judge.[2]

PER CURIAM. Following the first appeal of this case, *Johnston-Taylor v. Gannon*, 907 F.2d 1577 (6th Cir. 1990), we remanded for further proceedings to determine the merits of plaintiffs' substantive and procedural due process claims. On remand, the district court reaffirmed its grant of summary judgment to the defendants.

---

[2] The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

For the following reasons, we affirm.

In our earlier opinion we determined that David Arganian and the Estate of Professor Edward Taylor had a property interest in continued employment with the university. Both Arganian and Taylor were faculty members at Lansing Community College and their permanent full-time employment was terminated in 1983 due to the alleged existence of a financial exigency at the college. We found that professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds. 907 F.2d at 1581 (citing *Whitsel v. Southeast Local District*, 44 F.2d 1222, 1228 (6th Cir. 1973)). Because the original record was unclear as to the process the two professors received at their termination, as well as to the substantive nature of the alleged financial exigency, we issued a narrow opinion remanding this matter to the district court to develop the record further.

On remand, the district court held a three-day evidentiary hearing on the issues of procedural and substantive due process. With regard to the procedural due process afforded the two men, the court made several findings. The court found that Arganian and Taylor, as well as other faculty members, were sent written notification on

July 22, 1983, advising them that their employment would be terminated in forty-five days because of a reduction in staff. For the purposes of the procedural due process analysis, the court found that the actual date of termination was September 6, 1983. This was the date, forty-five days after the July 22 letter, on which the terminations were to become effective. Within a week of receiving the notification letter, Arganian met twice with college personnel to discuss the reasons for his impending lay-off. On July 25, Arganian met with Department Chair Head Dr. Anderson, who advised Arganian that the three factors considered in Arganian's selection for termination were the full-time to part-time ratio in his department, personal evaluations, and declining enrollment. Arganian then met with Ronald Dove, the Director of Personnel, on July 27. Dove explained Arganian was not fired, but merely laid off as part of a reduction in the work force. According to Arganian, Dove stated he could not give specific reasons for Arganian's layoff. The court specifically rejected Arganian's testimony to this effect as not credible.

Professor Taylor met with Dove on July 27. Although Taylor was not accompanied by an attorney at this meeting, he was accompanied by the vice-president of his union, Dennis Meyer. When Dove began to tell Taylor why he was laid off, Taylor responded he did not want to "hear it" from

Dove. Neither Arganian or Taylor, nor the representatives, asked for any documents or additional facts concerning their selection for lay-off, nor did the plaintiffs request further opportunities to meet with Dove or other college representatives.

On or about August 12, Arganian and Taylor, as well as other faculty members, filed written grievances protesting their lay-off under the collective bargaining agreement. On August 25, prior to the effective date of their lay-off, the first of three hearings was held. At this hearing, the college presented specific reasons and findings that led to the selection of Arganian and Taylor for lay-off, including declining enrollment figures, full-time and part-time ratios, and performance evaluations. The plaintiffs made no request for additional documentation to support this data. Following two extensions requested by the professors, a second hearing was held on September 13. A third hearing was held on October 25. During both hearings, the parties discussed the bases for the two men's selection for lay-off and the underlying economic circumstances. The only documentation requested was previous promotion scores. On November 23, following the hearings, Arganian and Taylor received a detailed written explanation for their lay-offs. The lay-off grievances went into arbitration in July and August of 1984. The arbitrator determined the lay-offs did

not violate the collective bargaining agreement.

The court found that the college faced a financial exigency for the fiscal year of 1983-1984 and took various measures to reduce the deficit by over one million dollars prior to resorting to lay-offs of full-time staff. The court gave weight to testimony by the college business manager, Bruce Newman, that financial difficulties began in the 1979-1980 fiscal year due to decreasing revenues and increasing costs. State appropriations were cut dramatically between 1979 and 1983 and state support per student declined by almost 11% during that time period. At the same time, salaries, which represented 70-75% of the budget, increased by approximately 26%. To combat the financial problems, the college increased student tuition by 45% during 1979-1983 and did not fill vacated positions. By April of 1983, the college anticipated a budget deficit in the amount of $2,331,000. The board established a budget and finance task force to study what means might be taken to generate revenue and save money. In June, the college's attempts to raise an additional $610.000 through a millage was defeated. At this time the anticipated deficit was $1,674,000. The college then instituted the following cost-reduction measures: (1) tuition was raised by an additional dollar per credit hour; (2) the president declined a salary increase; (3) the members of the president's council agreed to accept only a 5% raise

instead of the scheduled 8% increase, part-time personnel budgets were reduced; and, (4) the school offered an early retirement option. These measures reduced the budget deficit by $343,270.

The district court also addressed the manner in which Arganian and Taylor were selected for termination. The court found that use of only three of fourteen criteria, formulated by agreement between the college and union, was a rational basis for the lay-offs. The standard criteria, which were not prioritized, were as follows: (1) affirmative action; (2) budgetary restrictions; (3) community needs; (4) cost effectiveness; (5) credit hour production; (6) diversity of personnel; (7) ease of program delivery; (8) enrollment trends; (9) institutional needs and program priorities; (10) interdisciplinary adaptability; (11) length of employee services; (12) personal evaluations and qualifications; (13) program costs; and (14) ratio of full-time to part-time employees. Arganian and Taylor taught in the Division of Arts and Science and the Dean of the Division, Sam Kintzer, was given primary responsibility for making the initial selections for staff reduction. Kintzer considered three criteria most relevant to his department's layoff determinations: (1) the three-year history of program enrollments; (2) the ratio of full-time to part-time faculty; and (3) performance evaluations. Kintzer was particularly

concerned with the full-time and part-time ratio. Kintzer determined that program costs, ease of program delivery, and community needs were not particularly relevant categories. He also considered it meaningless to compare the faculty members on length of service because most of the faculty had long tenure. Deans from other divisions apparently gave different weight to various criteria and did not employ the precise method used by Kintzer. The court concluded that its role was not to determine whether the three criteria used by Kintzer were the best criteria, simply whether the criteria used by Kintzer were rationally based. The court concluded that Kintzer's emphasis of the three criteria was rationally based and permissible.

Based on the record before us, we find the district court did not improperly grant summary judgment to the defendants. Although we refrain from agreeing at this time with the district court's suggestion that *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), is the standard by which this matter should be judged, we find the record sufficient to support a conclusion that a Whitsel-type hearing, see *Whitsel v. Southeast local School District*, 484 F.2d 1222 (6th Cir. 1973), was afforded the plaintiffs. In Whitsel, we found that a teacher's continuing contract could not have been terminated without a hearing in which he would be informed of the grounds for dismissal and be given

an opportunity to challenge the sufficiency of the grounds. 484 F.2d at 1222. We emphasized that this finding was derived from the pertinent Ohio statute, which specifies the grounds for termination of a continuing contract. The Ohio statute requires written notice, time to prepare a defense, the option of a referee to conduct the hearing instead of the school board, a stenographic record, the right of confrontation, the right to cancel, and the right to subpoena witnesses. Id. at 1229. Our finding in *Whitsel* was based upon a notion that the Ohio statue satisfied federal constitutional due process requirements. However, we never held in Whitsel that the requirements in the Ohio statute represented minimum standards of federal constitutional due process. Id. ("[T]ested by every standard ever enunciated, these rights [as announced in the Ohio Statute] constitute procedural due process in a termination proceeding.").

The record developed at the evidentiary hearing on remand clearly reveals that the professors were given sufficient notice and opportunity to challenge the grounds for their lay-off prior to the effective date of the lay-off. The court expressly found that the lay-off did not occur until forty-five days after the date on which the board voted to lay-off the two professors. Both professors received immediate written notice of their impending lay-off and an explanation that the basis for their lay-off was a staff reduction due to a

financial exigency. Both men had actual or constructive knowledge of the underlying budget troubles and, within a week of receiving the notice, both professors met with the personnel director who attempted to explain the manner in which their names were selected for lay-off. Both men also had opportunity for a more elaborate pre-termination hearing at the level-two grievance proceeding on August 25, 1983. We also find sufficient evidence in the record to support the district court's conclusion that the college faced an exigent financial circumstance and that the choice of three of the fourteen criteria as the basis for terminating Professors Arganian and Taylor was reasonable. Plaintiff's equal protection and free speech arguments are without merit.

For the foregoing reasons the district court is affirmed.

NO. 89-1682

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHNSTON-TAYLOR, Individually and as Administratrix of the Estate of Edward Taylor, Brinton Scott, Kimberly Taylor, Individually; David Arganian; Lillian Arganian, Individually,

Plaintiffs-Appellants

On Appeal from the United States District Court for the Western District of Michigan

v.

Philip J. Gannon, Individually and as President of Lansing Community College; Board of Trustees of Lansing Community College, Individually, Jointly and Severally,

_____/

Before: MARTIN and JONES, Circuit Judges; and FEIKENS, Senior District Judge[1]

---

[1]. The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

BOYCE F. MARTIN, JR., Circuit Judge. David Arganian and the estate of Edward Taylor appeal the district Court's decision granting summary judgment for Philip J. Gannon, President of Lansing Community College, and the Board of Trustees of Lansing Community College in this wrongful discharge action. Arganian and Taylor, former professors at Lansing Community College, contend that their procedural due process rights were violated because they were denied a hearing on the necessity of a lay-off under which they were discharged. Because we believe there is a sufficient question of the validity of the procedural due process provided to Professors Arganian and Taylor, we reverse and remand.

Lansing Community College hired David Arganian in 1961 and Edward Taylor in 1966 as full-time instructors. Professor Arganian became a tenured faculty member in 1968. Professor Taylor was employed pursuant to a continuing contract.

In 1968, the College faculty voted to establish a collective bargaining unit, and thereafter the Board of Trustees and the faculty union entered into a collective bargaining agreement. Both Arganian and Taylor were charter members and active members of the faculty union. When the professors were discharged in 1983, Taylor was

president of the union and a vocal critic of President Gannon and the Board of Trustees. The professors contend that Gannon and the Board wanted to discharge them for personal and other reasons but lacked good cause under the collective bargaining agreement. The College claims that a financial exigency existed at the time and that both were dismissed under a reduction in staff.

The college claims that several factors caused the alleged financial exigency. During the fiscal 1982-83 year, the State of Michigan reduced a portion of the College's state aid. In March 1983, the Board of Trustees contracted to purchase $250,000 of high technology equipment. Anticipating a large budget deficit, the Board authorized a millage election under Michigan law which allows a local community to impose a tax upon itself for a specific purpose. The millage proposal was defeated in June 1983.

In response to the budget deficit, the College increased tuition by $1/credit hour and decreased spending in a number of areas. In addition, the College approached the leadership of the five employee bargaining units to obtain wage or benefit concessions. Only one union agreed to any of the proposals. Professor Taylor was president of the faculty union when it rejected the proposals.

The College thus decided to reduce its faculty to balance the budget. The agreement between the College and

the faculty union covered the employment of the faculty and also provided for reductions. Essentially, the agreement gave the Board of Trustees the exclusive right to determine a reduction in the number of faculty employed by the College. The faculty association, however, had the right to make recommendations and agree to a mutually satisfactory process for the reductions.

In June of 1983, the College and various unions bargaining representatives, including Taylor, signed a memo which detailed various criteria for the reduction. President Gannon directed the deans of the College's divisions to conduct program reviews in accordance with the agreed upon criteria and to recommend people for possible layoff. Later, Gannon assigned each division a share of the budget deficit to eliminate by reduction of staff. He also appointed a review committee, of which he was not a member, to assist the deans in applying the criteria in their program reviews.

Sam Kintzer was Dean of the Division of Arts and Sciences where Professor Arganian and Taylor taught. Dean Kintzer selected only three of the fourteen recommended criteria as most relevant to his division: 1) enrollment trends, (2) ration of full-time to part-time faculty, and (3) personal evaluations and qualifications. He ranked all the programs in the division by percentage of enrollment decline over the three previous years and the ratio of full-time to

part-time faculty. Instructors in the programs with the greatest decline and the highest ratio were then ranked by their performance evaluations. These evaluations had been conducted for several years and consisted of 60% administrative ratings and 40% student ratings. Dean Kintzer then determined which faculty members should be laid off. His recommendations included Professors Arganian and Taylor.

President Gannon did not substitute or alter any recommendations and forwarded them to the Board of Trustees for acceptance. The Board approved the layoffs on Arganian and Taylor. Subsequently, Arganian and Taylor accepted part-time employment with the College. On February 5, 1986, Taylor committed suicide, allegedly due to depression over his dismissal.

Several of the laid-off faculty, including Arganian and Taylor, filed grievances under the agreement alleging that the College's reduction in staff was "arbitrary, capricious and in bad faith." The grievances went to arbitration. The arbitrator determined that the College was subject to a covenant of good faith. The arbitrator found no arbitrary and capricious conduct and that the administration exercised good faith managerial judgment after duly considering all permissibly relevant factors.

After the arbitration decision, Professor Arganian and

Professor Taylor's estate filed a four-count complaint alleging that President Gannon and the Board of Trustees violated 42 U.S.C. sec. 1983 by abridging Taylor's first amendment rights, the due process rights of both, the Michigan Elliott-Larson Civil Rights Act as to both, and the Michigan Wrongful Death Act as to Taylor.

The district court initially addressed the due process claims, as to procedural due process, the district court found that it must first determine whether a protected property interest exists. Both Arganian and Taylor claimed a protected property interest under the collective bargaining agreement in their continued employment and Arganian claimed an additional basis for a property interest as a tenured employee before the agreement went into effect. The district court found that the agreement controlled the employment relationship of both, as the agreement superseded any tenure rights Professor Arganian had.

After the district court assumed that Arganian and Taylor possessed a legitimate expectation of continued employment under the agreement, it then determined what due process was constitutionally required. The court found that the collective bargaining agreement provided procedural safeguards to protect the employees and provided for three types of discharge: just cause, non-renewal of contract, and reduction in staff, the method used to discharge Professors

Arganian and Taylor. The district court agreed with the arbitrator that the agreement's procedural safeguards had been observed and that no material fact existed as to whether Arganian and Taylor had received all of their contractual rights under the grievance procedure.

The district court stated, however, that the critical issue was whether the requirements of constitutional due process were observed. The district court determined that the grievance procedure specified in the agreement satisfied the requirements of constitutional due process and thus concluded that there was no violation of procedural due process as to Arganian's and Taylor's protected property interests.

Professors Arganian and Taylor also claimed that they were deprived of their vocational liberty interests without due process. The district court found the allegations supporting this claim to be legally and factually insufficient to demonstrate that Arganian and Taylor had a definite range of opportunities no longer open to them. *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1097-98 (6th Cir. 1975).

As to substantive due process, the district court found that Arganian and Taylor had to show that the College's conduct was arbitrary, capricious, and without a rational basis. The district court held that the three criteria used by

Dean Kintzer in determining layoffs had a rational basis and that the determination of a financial exigency was made in good faith, and thus the College did not violate the substantive due process rights of Arganian and Taylor.

The district court then examined the claim that Taylor's first amendment rights were violated because he was laid off due to his criticism of President Gannon and his union activity. The court assumed that Taylor's conduct was constitutionally protected, but found there was no evidence that Taylor was dismissed because of his criticism and union activity. Thus, the court concluded that the protected conduct was not a substantial or motivating factor for the adverse action. *Connick v. Myers*, 461 U.S. 138 (1983).

Additionally, the district court, relying on *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), held that President Gannon and the Board of Trustees were also entitled to summary judgment on the federal claims on the basis of qualified immunity. The court determined that there was insufficient evidence to create a genuine issue as to the truth of the allegations that Gannon and the Board committed acts that violated clearly established law. Accordingly, the court found that the undisputed facts showed that reasonable officials in similar positions could have believed their conduct to be lawful.

Both claims under the Michigan Wrongful Death Act

and the Michigan Civil Rights Act were pendent state claims and were therefore dismissed by the district court because it had found that summary judgment was appropriate on the federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Because these state law issues were not raised on appeal and because of our resolution of the case, we need not consider them now.

The primary issue on appeal is whether Professors Arganian and Taylor were denied procedural due process. Arganian and Taylor's estate contend that under the collective bargaining agreement Arganian and Taylor had a protected property interest in their continued employment as professors at a public college and that Arganian had an additional interest as a tenured professor. They argue that due process requires that they receive a hearing on the reason for their discharge, in this case on whether there was a legitimate financial exigency facing the College, and on why they were selected for discharge. The professors claim that they were not given the reasons for their selection until after they were dismissed and that there was never a hearing on the existence of the financial exigency.

We engage in a two-step analysis when resolving procedural due process issues. We initially determine whether a protected property or liberty interest exists and then determine what procedures are required to protect that

interest.

Public college professors have a constitutionally protected property interest in their teaching positions when they have a legitimate expectation of continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). A professor subject to a continuing contract has a legitimate expectation of continued employment and, therefore, has a protected property interest. *Whitsel v. Southeast Local School District*, 484 F.2d 1222, 1229 (6th Cir. 1973), citing *Perry v. Sindermann*, 408 U.S. 593 (1972). Because the collective bargaining agreement in this case provided for continuing employment, we find that both Professor Arganian and Taylor had a protected property interest which could only be terminated in accordance with due process under the fourteenth amendment.

In addition, a public college professor with tenure also has a legitimate expectation of continued employment and therefore, has a property interest which is protected by due process. *Roth*, 408 U.S. at 576, citing *Slochower v. Board of Education*, 350 U.S. 551 (1956). The district court incorrectly determined that Arganian's tenure rights had coalesced into the rights of continuing contract. There is simply no legal foundation for this hold by the district court. Thus, Professor Arganian had an additional basis for a protected property interest as a tenured employee of the College.

Given that both Arganian and Taylor possessed a protected property interest in their continued employment with the College, we turn now to determine what due process was constitutionally required to protect that interest. The law is quite clear on this question. Professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds. *Whitsel*, 484 F.2d at 1228, citing *Perry*, 408 U.S. 593, and *Slochower*, 350 U.S. 551.

The College claims that Professors Arganian and Taylor were properly dismissed under a reduction in staff made necessary by a financial exigency. Yet neither Arganian nor Taylor were told the reason for their dismissal prior to their discharge. The professors did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings; the arbitrator never decided the issue of financial exigency. Thus, Professors Arganian and Taylor never had a sufficient opportunity to challenge the grounds for their dismissal, including the existence of the alleged financial exigency.

The district court found that the grievance procedure specified in the collective bargaining agreement satisfied the

requirements of constitutional due process and, therefore, found that summary judgment was appropriate on the procedural due process claim. We, however, are not completely satisfied that Professors Arganian and Taylor were afforded all the process due them. Because they never had the opportunity to challenge the grounds for their dismissal prior to their discharge, we believe there is a sufficient question of the validity of the procedural due process provided to them to warrant an evidentiary hearing.

As to the substantive due process claim, the issue is whether there was a rational basis for the layoffs. Arganian and Taylor contend that the purpose of the June 1983 memo was to set forth criteria for program review, not discharge of individual faculty. They also assert that because Dean Kintzer selected only three of the fourteen criteria recommended in the memo, their layoffs lacked a rational basis. Because the professors' contentions must be taken as true, we find that they have presented a material issue as to whether there was a rational basis. In addition, an evaluation of a "good faith" determination of financial exigency is needed to resolve this issue, which necessarily requires a determination of whether exigency in fact existed. Thus, an evidentiary hearing is also appropriate on the substantive due process issue.

Accordingly, we reverse the district court's grant of

summary judgment on the procedural and substantive due process issues and remand for an evidentiary hearing on those issues.

Such other issues raised in this appeal need not be addressed now. They may be considered by the district court as it may deem appropriate.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. 1:86-CV-661
HON. ROBERT HOLMES BELL

PHILLIP J. GANNON, individually and as President of Lansing Community College, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

OPINION

Plaintiffs appealed the entry of summary judgment for the defendants in this wrongful discharge case. The Sixth Circuit Court of Appeals reversed the decision in part and remanded for an evidentiary hearing on the issues of

procedural and substantive due process. Johnston-Taylor v. Gannon, 907 F.2d 1577, 1582, (6th Cir. 1990).

The Court met with counsel for both parties on January 10, 1991, and solicited their input on what procedures should be followed on this somewhat unusual remand. Thereafter the Court proceeded in the manner it thought best complied with the instructions of the Court of Appeals. An evidentiary hearing on the issues of procedural and substantive due process was held on March 14, 15, & 25, 1991. The Court's findings are set forth below.

The background facts are set forth in this Court's earlier opinion and in the Court of Appeals opinion. There is no need to reiterate them here. In this opinion the Court will focus on only those facts that are relevant to the precise issues outlined by the Court of Appeals.

1. Procedural Due Process

On the issue of procedural due process the Court of Appeals directed as follows:

> We, however, are not completely satisfied that Professors Arganian and Taylor were afforded all the process due them. Because they never had the opportunity to challenge the grounds for their dismissal prior to their discharge, we believe there is a sufficient question of the validity of the procedural due process provided them to warrant an evidentiary hearing.

Johnston-Taylor, 907 F.2d at 1582.

The Court of Appeals further stated that Arganian

and Taylor were not told the reason for their dismissal prior to their discharge, and did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings. Id. at p. 1581.

With all due respect to the Court of Appeals, the Court finds some ambiguity in these statements. It is not immediately clear whether they represent factual determinations, or whether they merely identify issues of fact contained in the record on appeal. In view of the fact that the Court of Appeals directed that there be an evidentiary hearing on the process accorded to the professors, these statements are interpreted by this Court not as binding factual determinations but as issues of fact requiring further evidentiary development.

The evidentiary hearing revealed that Arganian, Taylor and 20 other faculty members were sent written notification on July 22, 1983, advising them that their employment with the College would cease in 45 days because of a reduction in staff.

Within the week Arganian had two meetings with College personnel to discuss the reasons behind the layoff.

On July 25, 1983, he met with his department chairperson, Dr. Anderson. Anderson advised him that factors considered in his selection were the full-time to part-

time faculty ratio in the department, personal evaluations, and declining enrollment.

Arganian, accompanied by his attorney, Joseph Warren, next met with Ronald Dove, the Director of Personnel, on July 27, 1983. Dove explained that Arganian had not been fired, but was merely laid off as part of a reduction in force. Arganian admitted that in response to his questions about the criteria used to fire him, Dove explained that the 14 criteria were taken into account, that the full-time to part-time faculty ratio in his department was out of line, that he had low personal evaluations, and that enrollment in his area, Western Civilization, was declining.

The Court finds Arganian's testimony that Dove stated he could not give the "specific reasons" for his layoff because Arganian's attorney was present incredible in light of Dove's statement to the contrary, Arganian's failure to mention this alleged statement in his sworn arbitration testimony a year after the meeting, and the admitted failure of either Arganian or his attorney to challenge or inquire further about the highly compromising nature of this alleged statement.

Taylor also met with Dove on July 27, 1983. Taylor was accompanied by Dennis Meier, Vice President of his union. When Dove began to tell him why he had been laid off he told him he really did not want to hear it from him.

Neither Arganian, Taylor, nor their representatives, asked Dove for any documents or additional facts concerning their selection for layoff, nor did they ask for any further opportunity to meet with Dove or other College representatives.

On or about August 12, 1983, Arganian, Taylor, and 6 other faculty members filed written grievances protesting their layoff under the collective bargaining agreement. Earlier, Dove had agreed to the request of their union representative that the time for filing the grievances be extended to August 15, 1983, and that the grievances be initially discussed at the second, rather than first, step of the grievance procedure.

On August 25, 1983, prior to the effective date of their layoff, the first of three hearings was held. At that hearing the College presented the specific reasons and findings that led to the selection of Arganian and Taylor for layoff, including the figures used in reviewing declining enrollment, full-time to part-time ratios, and performance evaluations. No request was made for documentation of this data.

After two extensions requested by the grievants for purposes of amending their grievances, a second hearing was held on September 13, 1983. A third hearing was held on October 25, 1983. During these hearings there was more discussion about the reasons for Arganian's and Taylor's

selection for layoff, and about the underlying economic circumstances that gave rise to the layoffs. The only documentation requested by Taylor, Arganian or their union representatives was previous promotion scores.

On November 23, 1983, following the hearings, Dove sent Arganian and Taylor a detailed written explanation for their layoffs. (Def. Exh. P).

The layoff grievances were then processed to an arbitration hearing before an Arbitrator in July and August 1984. In a decision dated December 19, 1984, the Arbitrator determined that the layoffs did not violate the collective bargaining agreement.

The issue before this Court is whether the layoffs complied with procedural due process.

Procedural due process issues require a two-step analysis. The Court must determine first whether there was a protected liberty or property interest and second, what procedures are required to protect that interest.

The first issue has already been determined. Because they were subject to a continuing contract, Professors Arganian and Taylor had a legitimate expectation of continued employment and, therefore, had a protected property interest. Johnston-Taylor, 907 F.2.d at 1581 (citing Whitsel v. Southeast Local School District, 484 F.2d 1222, 1229 (6th Cir. 1973)).

In addition, the Court of Appeals held that contrary to this Court's previous ruling, Professor Arganian's tenure rights did not coalesce into the rights of continuing contract, and therefore he had an additional basis for a protected property interest as a tenured employee of the College. Johnston-Taylor, 907 F.2d at 1581.

Having determined that there was a protected property interest, we move to the second step of the analysis: What process was due? The Court of Appeals stated that the law on what process was constitutionally required is quite clear: "Professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds." Id. at 1581 (citing Whitsel, 484 F.2d at 1228.

Stating the necessity for notice and a hearing, however, does not end the analysis. The Court must still determine the nature and timing of the required hearing.

Due process is flexible and calls for such procedural protections as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). It requires the opportunity to be heard "at a meaningful time and in a meaningful manner." Id. at 333. Not every situation will require an evidentiary hearing before, rather than after, the deprivation of a property interest. Id. at 333-34.

The Supreme Court has held that tenured public employees are entitled to a pre-termination hearing before they can be discharged for cause. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985). The Sixth Circuit has not, however, directly addressed the procedures required in the context of a layoff due to financial exigency.

Bother the Collective bargaining agreement and the generally accepted concept of tenure permit a college to layoff a tenured teacher because of financial exigency so long as its action it demonstrably bona fide. See e.g., Krotfoff v. Goucher College, 585 F.2d 675, 678 (4th Cir. 1978). A bona fide dismissal based on financial exigency, unlike a dismissal for cause, is essentially impersonal, and does not threaten the values protected by tenure. Id. at 680. Academic freedom, which is protected by tenure, is not at stake when a teacher is dismissed not for cause but for financial reasons. Id. Accordingly, it is well recognized that the full procedural safeguards available when termination of a tenured faculty member is "for cause" are not required when the termination is based on a financial exigency. See e.g., Jinenez v. Almodovar, 650 F.2d 363, 368-69 (1st Cir. 1981); Browzin v. Catholic University of America, 527 F.2d 843, 847 (D.C. Cir.

1975).[4]

Jimenez, 650 F.2d at 370, involved the discharge of university professors upon the bona fide elimination of their positions. The Sixth Circuit cited Jimenez in support of the proposition that due process does not always require a pre-deprivation hearing when an interest in employment is affected. Ramsey v. Board of Education, 844 F.2d 1268, 1973

---

[4] The distinction between the procedural protections due when the layoff is for financial exigencies as opposed to cause is also reflected in the MIchigan Teachers' Tenure Act, M.C.L. sec. 38.71 et seq.; M.S.A. sec. 15.1971 et seq.. Under the Act, a tenured teacher may be terminated due to economic necessity. M.C.L. sec. 38.105; M.S.A. sec. 15.2005; Smith v. Wyoming Public Schools Board of Education, 128 Mich.App. 746, 749 (1983). However, in such a case the Act's notice and hearing protections do not apply. Steeby v. School District of the City of Highland Park, 56 Mich.App. 395, 398-99 (1974):

> Indeed, there would appear to be no real reason for a hearing where the reason for termination is a reduction in personnel rather than personal charges against a teacher, since the purpose of the hearing in to provide the opportunity for the teacher to answer the charges being brought against him. The protection which the act provides where the termination is the result of a reduction of personnel is not that of a pointless hearing but is rather that found in MCLA 38.105, supra, which provides that those tenure teachers thereby terminated shall be appointed to the next vacancy.

Id. at 399. When a teacher is laid off because of economic necessity, notice and hearing "would constitute a useless gesture since neither his conduct nor performance is being called into question." Chester v. Harper Woods School District, 87 Mich. App. 235, 244 (1978).

(6th Cir. 1988).

Other courts have also recognized that a post-decision hearing process is adequate when a teacher is laid off for financial exigency rather than for cause. Bignall v. North Idaho College, 538 F.2d 243,248 (9th Cir. 1976); Johnson v. Board of Regents, 377 F. Supp. 227, 239 (W.D.-Wis. 1974), affirmed, 510 F.2d 975 (7th Cir. 1975). The basis for this difference, as recognized by the Sixth Circuit in Ramsey, 844 F.2d at 1273-74, is that a layoff due to bona fide elimination of position or financial exigency does not impact the special nature of tenure rights.

In this case, because Arganian and Taylor were laid off as a result of a reduction in personnel due to financial exigencies rather than because of any personal charges against them, whatever process was due them was less than that required in Loudermill.

In the for cause termination in Loudermill the Court required a pre-termination hearing, but held that the hearing need not be elaborate. Id.

> The tenured public employee is entitled to oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546. Where state law provides for a full administrative post-termination hearing and judicial review, the pre-termination hearing need not definitively resolve the

propriety of the discharge. Id. at 545. It merely serves as an initial check against mistaken decision. Id. A pre-termination interview, even by one who is not actually empowered with the authority to fire, is enough to satisfy due process. Loudermill v. Cleveland Board of Education, 844 F.2d 304, 312 (6th Cir. 1988) (on remand), cert. denied, 488 U.S. 941 (1988).

While notice of the grounds for dismissal prior to discharge may not have been clear from the record before, the record developed at the evidentiary hearing on remand clearly revealed that the professors were given notice and opportunities to challenge the grounds for their layoff prior to its effective date.

The date of the layoff was not, as plaintiffs claim, on July 22,1983, when the Board voted to lay them off. The layoff did not occur until 45 days later, as indicated in the layoff notice. Plaintiffs' attempt to define the time the decision to terminate is made as the time termination occurs was flatly rejected in Bignall, 538 F.2d at 246. See also, Chung v. Park, 514 F.2d 382, 386 n.7 (3rd Cir. 1975), cert. denied, 423 U.S. 948 (1975); Vance v. Chester County Board of School Trustees, 504 F.2d 820, 825-26 (4th Cir. 1974).

In this case Arganian and Taylor received immediate written notice of the layoff and an explanation that the basis for their layoff was a staff reduction due to a financial

exigency. Both had actual or constructive knowledge of the underlaying budget shortfall leading to the lay-off decision and the opportunity to confront the defendants regarding this budget problem prior to the effective date of their lay-offs.

Within a week of receiving notice, the personnel director sat down with Arganian and Taylor and their selected representatives and attempted to explain the manner in which their names were selected for layoff. Since it is the opportunity to respond that is important, Taylor's decision not to listen to the reasons is irrelevant to our review of the procedures made available. Loudermill, 844 F.2d at 312 (citing Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1068-69 (6th Cir. 1984).

Arganian and Taylor also had an opportunity for a more elaborate pre-termination hearing at the Level 2 grievance proceeding on August 25, 1983. At the Level 2 grievance they and their union representative met with the director of personnel to discuss the issues surrounding the layoffs. That the subsequent hearings went beyond the date of termination was not a result of delay on the part of the College. Through this proceeding Arganian and Taylor received oral notice of the basis for the discharge, an explanation of the College's evidence, and an opportunity to present their side of the story.

Subsequent to termination Arganian and Taylor had a right to a full arbitration hearing and judicial review.

Because the professors were not discharged for cause but for financial exigency, they were entitled to less procedural safeguards than described in Loudermill. Nevertheless, even if Arganian and Taylor were entitled to all the procedures outlined in Loudermill, there is no question of fact that they received them.

Neither in the pleadings nor in the testimony presented at the evidentiary hearing has plaintiff been able to show the existence of a sufficient issue of fact for the jury. Both professors received all the process they were due.

2. Substantive Due Process

On the issue of substantive due process the Court of Appeals directed as follows:

> As to the substantive due process claim, the issue is whether there was a rational basis for the layoffs. Arganian and Taylor contend that the purpose of the June 1983 memo was to set forth criteria for program review, not discharge of individual faculty. They also assert that because Dean Kintzer selected only three of the fourteen criteria recommended in the memo, their layoffs lacked a rational basis. Because the professors' contentions must be taken as true, we find that they have presented a material issue as to whether there was a rational basis. In addition, an evaluation of a "good faith" determination of financial exigency is needed to resolve this issue, which necessarily requires a determination of whether exigency in fact existed. Thus, an evidentiary hearing is also appropriate on the substan-

tive due process issue.

Johnston-Taylor, 907 F.2d at 1582.

A. Purpose of Criteria

The Court of Appeals remanded in part for an evidentiary hearing as to the purpose of the June 1983 memo. Plaintiffs contended it set forth criteria for program review, not for discharge of faculty.

The June 1983 memo is a one page document entitled Recommendations Regarding Reductions in Personnel During a Period of Impending Layoff. Joint Exhibit 2. It was signed by the representatives of the 5 employee associations on July 8, 1983. The document states that the association representatives met as a group "to present their recommendations, regarding staff reductions". The recommendations read in part as follows:

> 1. Any areas to be affected by staff reductions will be determined through program reviews and/or program, departmental or divisional reorganizations.
>
> 2. The criteria to be used for program reviews and program, departmental or divisional reorganizations shall include, but not be limited to the following: (The following list does not imply a priority listing.)
>
> [14 criteria are listed]

The final paragraph notes that the document does not preclude employee association representatives from making other recommendations "regarding personnel reductions". In

light of the clear language of the document, defendants' argument that the list is not for the purpose of staff reductions is disingenuous.

The Court finds the purpose of the criteria was to provide guidance for staff reductions and that there is no question of fact on this point.

B. Selection of Criteria

This Court has been asked to make evidentiary findings on whether the application of only 3 of the 14 criteria provided a rational basis for the layoffs.

The MAHE contract with the college provides in Article VI Section X that representatives from the Faculty Association and the Administration will meet to develop a mutually satisfactory process of reducing staff. The contract further provides:

> Criteria to be considered prior to a staff reduction <u>may</u> include, but will not be limited to:
>
> --length of service of the faculty member at L.C.C.,
> --institutional needs and program priorities,
> --budgetary restrictions,
> --enrollment trends,
> --interdisciplinary adaptability.

(Joint Exh. 5, p. 28) (emphasis added).

Using these guidelines, the union representatives and the administration arrived at a list of 14 criteria to consider in the staff reduction. The criteria, not in order of any priority, include, but are not limited to the following:

- affirmative action
- budgetary restrictions
- community needs
- cost effectiveness
- credit hour production
- diversity of personnel
- ease of program delivery
- enrollment trends
- institutional needs and program priorities
- interdisciplinary adaptability
- length of employee service
- personal evaluations/qualifications
- program costs
- ratio of full-time to part-time employees

Personnel Director Ronald Dove notified the union presidents on July 15, 1983, that a reduction in force would be submitted to the Board by July 22, 1983. A review team of 4 administrative representatives was formed to meet with divisional deans to review their programs. Dove and the committee met with all 5 academic deans and found that some of the 14 criteria were more applicable to some departments than to others.

Plaintiffs taught in the Division of Arts & Science. Dean Sam Kintzer was given primary responsibility for making the initial selection of individuals in his division for the staff reduction. Dean Kintzer was very methodical in his approach, and after considering all 14 criteria, selected three that he found were most relevant to his division. He used the 3 year history of program enrollments, the ratio of full-time to part-time faculty in specific program areas, and

performance evaluations.

Dean Kintzer was particularly concerned with the ratio of full-time to part-time faculty in a particular program area because if he were to lose all full-time faculty members in a department, the quality of that program would suffer considerable. On the other hand, if he had multiple full-time faculty members assigned to teach similar courses, the loss of one full-time faculty member in that area would not have as great an impact on the quality of the particular program.

Given the nature of the courses taught in his division, Kintnzer determined that program costs, ease of program delivery and community needs were not particularly relevant. He also found length of service not particularly relevant in his division because most of the faculty, particularly in the Humanities and Social Science Divisions, had long tenure, so it was not particularly meaningful to compare them on the basis of longevity.

Applying these standards, Kintzer recommended the layoff of three individuals: Edward Taylor from Social Science, David Arganian from Humanities, and John Manion from Communications. The review team reviewed with Kintzer his selection process and staff reduction recommendations.

The other deans also chose from among the 14 criteria those most relevant to their circumstances. The weight

given to various criteria differed from one division to the next. No deans made selections solely on the basis of length of service. Depending on the division's needs, some deans focused primarily on factors such as diversity or versatility, discontinuation of a program, low performance evaluations, or credit hour production. In other divisions as well, more senior faculty members were laid off where less senior members fared better on other criteria, such as diversity of personnel.

Retention of less senior faculty and consideration of factors such as evaluations and school needs were found acceptable in Bignall, 538 F.2d at 250.

The Court is not called on to determine whether the three criteria selected by Dean Kintzer were the most meaningful or best or fairest criteria, or whether the Court would have used the same criteria. Under the substantive due process analysis the Court may only review the selection of 3 of 14 criteria to determine whether they were rationally based.

The Court finds that when a list of criteria is formulated that applies to all groups within the College, it is reasonable to determine that some criteria will have greater relevance in one division than in another. Dean Kintzer's selection of the 3 year history of program enrollments, the ratio of full-time to part-time faculty in specific program

areas, and performance evaluations was not arbitrary, capricious, or without a rational basis. See Brenna v. Southern Colorado State College, 589 F.2d 475, 477 (10th Cir. 1978).

C. Financial Exigency

The Court of Appeals noted that the arbitrator never decided the issue of financial exigency and specifically remanded for an evidentiary hearing to evaluate whether a financial exigency in fact existed.

Bruce Newman, College Business Manager in 1982-3, testified that financial difficulties began in the 1979-1980 fiscal year due to decreasing revenues and increasing costs. State appropriations, which accounted for approximately 40% of the College's revenues, were cut by $1,555,000 between 1979 and 1983. State support per student declined by 10.8% during this period. State payments were also delayed, which adversely impacted the College's cash flow and interest income opportunities. Between 1979 and 1983, salaries, which represented 70-75% of the budget, increased by approximately 26%.

Defendants also presented evidence that the school took numerous steps to address the financial problems. The College increased student tuition by 45% between 1979 and 1983, and did not fill vacated positions. In March the Board proposed a millage request to raise $610,000. Despite the

College's efforts, in April 1983 the College anticipated a budget deficit in the amount of $2,331,000. Accordingly, the Board established a Budget and Finance Task Force, which included representatives from the board, administration, 4 union members (including Plaintiff Taylor) and a student. The objective of the task force was to look at ways to generate revenues and to save money.

In June, after the College's millage request was defeated, the College intensified its efforts to balance its 1983-84 budget. The deficit at this time was calculated to be $1,674,000. The administration held 9 meetings with union officials in an attempt to negotiate contract concessions to help alleviate the pending deficit. Taylor participated in these meetings the (sic) as president of M.A.H.E. The College raised tuition by an additional $1.00 per credit hour. The president declined a salary increase, members of the president's council agreed to accept 5% instead of the scheduled 8% increase, there was a reduction in part-time personnel budgets, and the school offered an early retirement option. As of July 1983 the deficit was reduced by these actions to $343,270.

The task force solicited ideas from faculty, staff, students, and other interested parties on ways to save money. Plaintiff Taylor was intimately involved in formulating the Budget Task Force recommendations. In a letter

submitted to the president on May 23, 1983, the task force acknowledged the need to make cutbacks to help eliminate a pending $1,760,000 deficit:

> We have been studying the college's tentative budget for 1983-84 fiscal year. We know that cutbacks will be required to help eliminate a pending $1,760,000 deficit even if State appropriations are increased beyond the current amount.

The letter was signed by members of the Task Force, including Ed Taylor. (Jt. Exh. 4, p. 23, 25).

Arganian, as a faculty member and member of M.A.H.E., was represented by Taylor on the Budget and Finance Task Force and in the joint administration and union officials meetings. As a faculty member he received communications from the Task Force soliciting his ideas for balancing the budget, (Jt. Exh. 4, p. 26), and he attended a faculty Senate meeting where the president, Dove and Newman appeared to answer questions the faculty might have about the impending budget deficit.

A memorandum dated July 8, 1983 was sent by the union presidents (including Taylor), the director of Personnel and the business manager to all bargaining unit personnel. The memo stated in part:

> Based on the current position of the association representatives, of not amending the existing contract provisions, the Board representatives stated that would be necessary to reduce personnel and that this process will be coupled with other voluntary or non-contractual means of

reducing costs.

(Jt. Exh. 4, p. 50).

The testimony as to the budget shortfall and the steps taken by the school to address the shortfall was not rebutted by the plaintiffs. Plaintiffs merely suggest that it was a violation of their substantive due process rights for the college to lay them off rather than forego any purchase of equipment.

In March 1983 approximately $250,000 was authorized for equipment from earmarked building and site funds. This amount was matched from vocational education sources and was not available for use for salaries. Moreover, plaintiffs' dispute with the manner in which the College met the financial exigency raises a political question rather than a constitutional question. The issue for this Court is not whether the College made the best decision. It is not for the court or jury to substitute its judgment for that of the administrative body on how best to spend the limited public funds entrusted to it. The only issue before this Court is whether the College's decision was rationally based upon a true financial exigency.

This Court finds that there is no question of fact regarding the bona fide existence of a financial exigency. Neither is there evidence that the reduction in force was arbitrary or generated by ill will, fraud, collusion or such

other improper motives. Defendants are accordingly entitled to summary judgment on the issue of substantive due process.

Plaintiffs' motion for summary judgment

After remand plaintiffs filed a motion for partial summary judgment. This is beyond the scope of the remand, and moreover is made moot by the findings of this Court after the evidentiary hearing. Accordingly, the motion must be denied.

Date: November 14, 1991 S/_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. 1:86-CV-661
HON. ROBERT HOLMES BELL

PHILLIP J. GANNON, individually and as President of Lansing Community College, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

ORDER

In accordance with the opinion entered this date.

IT IS HEREBY ORDERED that summary judgment if GRANTED in favor of the defendants on the issues of procedural due process and substantive due process.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment (Docket #180) is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

Date: November 14, 1991 S/ _____
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually

Plaintiffs, G86-661-CA5
HON. ROBERT HOLMES BELL

V.

PHILIP J. GANNON, individually and as President of Lansing Community college (sic), and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, individually, jointly, and severally,

Defendants.

_____/

OPINION

Before the Court is Defendant's motion for summary judgment on all four counts of Plaintiffs complaint. Plaintiffs claims that Defendants violated the Due Process Right of David Arganian and Edward Taylor, the First Amendment rights of Taylor, the Michigan Wrongful Death Act at to Taylor, and the Michigan Elliott-Larsen Civil Rights Act as

to both Arganian and Taylor.

BACKGROUND

As appears from the parties' pleading and briefing, Lansing Community College (LCC) hired David Arganian (Arganian) in 1961 and Edward Taylor (Taylor) in 1966 as full-time instructors. By 1968 Arganian completed his probationary period and was granted tenure. In 1968 the LCC faculty voted to establish a collective bargaining unit. Thereafter, the Board of Trustees of Lansing Chapter of the Michigan Association for Higher Education at Lansing Community College (MAHE) entered into a collective bargaining agreement (Agreement) Taylor was an active charter member of MAHE and was a vocal critic of Philip J. Gannon (Gannon), President of LCC.

Both Arganian and Taylor were working as full-time instructors on July 22, 1983, when the Board terminated their full-time employment. Defendants allege that a financial exigency existed at the time and that Arganian and Taylor were dismissed under a reduction in staff. Afterwards Arganian and Taylor accepted part-time employment with LCC. During the academic year 1982-83 Taylor was president of the local chapter of MAHE at LCC. On February 5, 1986, over two years after his termination, Taylor committed suicide. Plaintiffs allege that Taylor's suicide

resulted from depression over his termination.

The parties dispute the reasons for the termination of Arganian and Taylor. Arganian and Taylor maintain the budget deficit was merely a pretext. They contend that Gannon wanted to discharge them for personal and other reasons but laced good cause under the Agreement. LCC maintains the terminations were part of a reduction in staff designed to relieve LCC from a budget deficit.

LCC maintains that several factors caused the budget deficit. For example, cuts in state appropriations in September, 1982 and March 1983 totalling $798,437.00 contributed to the budget deficit. Also, in March of 1983 the Board approved purchase of $25,000 of high technology equipment requested by various departments. However, a millage election authorized by the Board to fund the purchase of the equipment was defeated in June, 1983. Nevertheless, LCC still purchased the equipment.

After the millage defeat the pending budget deficit for fiscal year 1983-84 was $1,674,000. (Affidavit of Bruce Newman, paragraph 20). To enhance revenues and reduce expenditures, LCC increased tuition by one dollar per credit hour, reduced its maintenance program, decreased supply purchases, limited new and replacement hiring, and offered early retirement options to present employees. This retrenchment reduced the anticipated budget deficit to $343-

,270 for fiscal year 1983-84.

To further balance its budget LCC approached the leadership of the five employee bargaining units to obtain wage or benefit concessions. In the 1981 contract, LCC and MAHE agreed to an 8% increase in faculty salaries for 1983-84. To alleviate the budget deficit LCC proposed to reduce the wage increase from 8% to 5% or possibly 6% if certain benefit concessions were made, for 1983-84. After nine meetings only one union agreed to any of LCC proposals. Taylor was the president of MAHE when it rejected the proposals.

Failing to gain concessions from the unions, the LCC administration determined to reduce its staff to balance the budget. The Agreement between LCC and MAHE covered Taylor's and Arganian's employment and also provided for reductions in staff. Essentially, the Agreement gave the Board the exclusive right to determine a reduction in staff. However, the faculty association had the right to make recommendations and agree to mutually satisfactory process for the stall reduction. The Agreement also provided certain non-exclusive criteria for reductions.[5]

---

[5] Section VI, Part X, of the Agreement entitled, "Reductions in Staff," provides:

1. The Faculty Association recognizes the exclusive right of the Board of Trustees to determine reductions in personnel and/or

On June 30, 1983, LCC and various union bargaining representatives, including Taylor as president of the MAHE signed a memorandum entitled, "Recommendations Regarding Reductions in Personnel During a Period of Impending Layoff," providing these joint recommendations:

> In consideration of the contractual provisions regarding reduction of personnel, the following recommendations are submitted to the President and/or the board of Trustees by the undersigned:

---

operations and the exclusive right to determine the area in which such reductions will be made subject to the provisions contained with this Agreement.

2. During a period of impending layoff, the Board agrees to attempt to accomplish staff reduction by natural attrition (such as resignation, retirement, etc.) and will consider requests for voluntary leaves of absence without pay.

3. Prior to any reduction in staff within the MAHE unit, the Faculty association will be provided an opportunity to present recommendations to the President or his/her designated representative(s) and the Board of Trustees regarding such reductions for consideration prior to the final decision.

4. Once it has been determined that a reduction in staff is necessary, representatives from the Faculty Association and the Administration will meet in an attempt to develop a mutually satisfactory process of reducing staff. Criteria to be considered prior to a staff reduction may include, but will not be limited to:

- length of service of the faculty member at L.C.C.,
- institutional needs and programs priorities,
- budgetary restrictions,
- enrollment needs
- interdisciplinary adaptability.

1. Any areas to be affected by staff reduction will be determined through program review an/or program, departmental or divisional reorganizations.

2. The criteria to be used for program review and program, departmental divisional reorganizations shall include, but not be limited to the following: (the following list does not imply a priority listing)

- affirmative action
- budgetary restrictions
- community needs
- credit hour production
- cost effectiveness
- diversity of personnel
- ease of program delivery
- enrollment trends
- institutional needs and program priorities
- interdisciplinary adaptability
- length of employee service
- personal evaluations/qualifications
- program costs
- ratio of full-time to part-time employees

It is also recognized that this document will not preclude the employee association representatives from making other recommendations regarding personnel reductions at a later time.

To determine the appropriate reduction Gannon directed the deans of LCC's several divisions to conduct program reviews in accord with the agreed upon criteria and to recommend people for possible layoff. Later, Gannon assigned each division a share of the budget deficit to

eliminate by reduction in staff. Gannon also appointed a review committee, of which he was not a member, to assist the dean of the several divisions in applying the recommended criteria in their program reviews and reorganizations.

Sam Kintzer (Kintzer) was Dean of the Division of Arts and Sciences where Arganian and Taylor taught. Kintzer selected only three of the fourteen criteria as most relevant to the Division of Arts and Sciences: (1) enrollment trends, (2) ratio of full-time to part-time faculty, and (3) personal evaluations and qualifications.. Kintzer ranked all the programs in the division by percentage of enrollment decline over the prior three years and the ratio of full-time to part-time faculty. Individual instructors in the programs with the highest full-time to part-time faculty ratios and the greatest decline in enrollment were then ranked in terms of the performance evaluation. The performance evaluations had been conducted for several years and consisted of 60% administrative ratings and 40% student ratings. After applying the three selected criteria Kintzer recommended certain faculty members, including Arganian and Taylor, for layoff. Kintzer also informed the departmental chairpersons of his selections.

The various deans presented their recommendations to Gannon. Gannon did not substitute or alter any recommendations of the deans and forwarded them on to the

Board. The Board approved the layoffs on July 22, 1983, and notified Arganian and Taylor that their full-time teaching positions were eliminated. However, both were offered, and each accepted other part-time teaching positions with LCC.

Several of the laid off faculty members filed grievances under the collective bargaining agreement alleging that LCC's reduction in staff was "arbitrary, capricious and in bad faith." They grieved through arbitration. The arbitrator determined that LCC was subject to a covenant of good faith in determining the existence of a financial exigency and in reducing staff. Further, the arbitrator found not arbitrary and capricious conduct in the staff reductions and further determined that the administration exercised good faith managerial judgment after duly considering all permissibly relevant factors.[6]

Plaintiffs have filed a four count complaint alleging

---

[6] The arbitrator determined that "the arbitrator . . . does not believe that the Board could properly be held to have acted in bad faith here . . . ." (Arbitrator's Decision, 12-13). Rather, the arbitrator decided that "the administration's layoff selections reflected good faith managerial judgments reached after due consideration of all relevant and contractually legitimate factors (including the mutually agreed upon criteria listed in the July 8, 1983 memorandum) and without reliance upon irrelevant or contractually illegitimate factors." Further the arbitrator determined that, even though Taylor had been a MAHE leader and an outspoken critic of LCC and Gannon, there was no " convincing support for the proposition that [Taylor's] 1983 layoff was either wholly or partially a product of . . . discrimination because of union activity." (Arbitrator's Decision, 25).

that Defendants violated 42 U.S.C. sec. 1983 by abridging the First Amendment rights of Taylor, the Due Process rights of Arganian and Taylor, the Michigan Elliott-Larsen Civil Rights Act as to Arganian and Taylor, and the Michigan Wrongful Death Act as to Taylor.

ANALYSIS

The United States Supreme Court has recently reviewed the standards for summary judgment. Celotex Cor. v. Catrett, 477 U.S. 317, 323-325 (1986); Anderson v. Liberty lobby, Inc., 477 U.S. 242, 249-50 (1986); Matsushita Elec. Industrial Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). To properly move for summary judgment a party must identify those portion of the filings before the Court indicating an absence of evidence to support an essential element of the opposing party's claim. In Celotex, at 323-325, the Court stated: "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." To avoid a summary judgment, the Plaintiff may not merely rely on the allegations in the complaint, but must present significant probative evidence tending to support the allegations in the complaint. In Anderson, at 249-50, the Court stated: "[T]here is not issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted). In Matsuchita, at 587, the Court stated: "It follows from these settled principles that if the factual context renders respondents' claim implausible . . . respondents must forward with more persuasive evidence to support their claim than would otherwise be necessary."

Plaintiffs claim that in laying off Arganian and Taylor the Defendants violated Arganian's and Taylor's constitutional rights to procedural and substantive due process and Taylor's right to freedom of speech.

A. DUE PROCESS

Due process claims may raise issues of either procedural due process or substantive due process. The right to substantive due process prohibits that state from depriving people of certain fundamental constitutional rights including the incorporated provisions of the Bill of Rights and various nontextual constitutional rights, such as family and privacy rights. It also protects people from state conduct that is arbitrary, egregious, and shocking; apart from whatever procedural safeguards are available. The right to procedural due process requires constitutionally adequate procedural safeguards where the state deprives people of life, liberty, and property.

1. Procedural Due Process

Resolution of procedural due process issues requires two step analysis. The court must first determine whether protected property or liberty interest exists and then determine what procedures are required to protect that interest.

Plaintiffs assert that under the Agreement Arganian and Taylor both maintained constitutionally protected property interests in their continued government employment and that Arganian had an additional basis for a property interest as a tenured employee. Courts recognize legitimate and valid expectations of continued government employment as constitutionally protected property interests. Such rights to continued government employment may arise out of statutes, contracts, or other "explicit understandings" between the employer and employee Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Board of Educ. v. Loudermill, 470 U.S. 532 (1985).

The Agreement between LCC and MAHE controlled the employment relationship of Arganian and Taylor with LCC. It provided for continuing employment in the nature of tenure with certain procedural safe-guards to insure employees' expectations of continuing employment. Section IX, part A, entitled, "Continuing Contract", provides:

1. Each full-time faculty member shall be issued a continuing contract after three (3) years of satisfactory teaching at the College.

2. In the event a faculty member on a continuing

> contract is not to be offered a contract for following year, he/she will be notified in writing by December 31. He/she will then have recourse to the Grievance procedure starting at Level Two.

However, the Agreement also recognized termination of employment under conditions of just cause, reduction in staff, and non-renewal of a continuing contract.

Arganian also asserts a property interest in his expectation of continued employment as a tenured employee at LCC. Arganian claims that his tenure arose prior to the existence of the Agreement, a collective bargaining agreement and was never extinguished. Arganian asserts he was told that he was a "tenured" employee, that the Agreement did not apply to him, and that when he resigned from administration duties in 1969, he formally indicated that he was returning to his "tenured" teaching professorship.

However, the Agreement provides:

> A. This Agreement shall supersede any rules, regulations, or practices of the Board which shall be contrary to or inconsistent with its terms. It shall likewise supersede any contrary or inconsistent terms contained in any constitutional or by-law provisions of the Association heretofore in effect. All faculty contracts shall be made expressly subject to the terms of this Agreement. The provisions of the Agreement shall be incorporated into and be considered part off the established policies of the Board.
>
> ....

> C. If any provisions of the Agreement or any application of the Agreement to any employee or group of employees shall be found contrary to law, then such provisions or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

Accordingly, the terms of the Agreement superseded any contrary or inconsistent tenure rights that Arganian possessed. Although a traditional tenure system may not be theoretically "inconsistent" and "contrary" with continuing contract under the Agreement, they are practically "inconsistent". Both systems are job security devices. The Agreement provided that "all faculty contracts shall be made expressly subject to the terms of this Agreement." The Agreement clearly subjected all faculty employment to the terms of "continuing contract". The existence of a separate system of job security protection is inconsistent with the Agreement's intent to subject all faculty contracts to the job security provisions of "continuing contract". After the faculty decided to be represented by MAHE, bargain with the LCC Board, and enter a collective bargaining agreement, the "explicit understanding" of the faculty was embodied in the explicit terms of the Agreement. Thus, Arganian's alleged tenure rights have coalesced into the rights of continuing contract. Cf. JI Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944); Pietrzykowski v. Safie, 1 Mich App 644, 647

(1965), lv. den. 377 Mich 703 (1966); Goetz v. Windsor Central School Dist., 698 F.2d 606, 609 (2nd Cir. 1983). Whatever property rights both Arganian and Taylor possessed in their continued government employment arose under the Agreement.

Assuming that Arganian and Taylor possessed a legitimate expectation of continued government employment under the Agreement, this Court now must determine what due process was constitutionally required to protect that property right. In Matthews v. Eldridge, 424 U.S. 319. 334-335 (1976), the Court identified three factors for evaluating the adequacy of due process in an alleged property or liberty interest deprivation (1) the private interest affected, (2) the risk of an error under existing procedures and the value of alternative procedures, and (3) the government's fiscal and administrative interest in the existing or alternative procedures.

The Agreement controlled the employment relationship between LCC and Arganian and Taylor and also provided procedural safeguards to protect the interests of employees. The Agreement provided for three types of termination: just cause, non-renewal of contract, and reduction in staff. The LCC administration terminated Arganian and Taylor in a purported reduction in staff. Although the Agreement granted LCC the exclusive right to

determine that a reduction in staff was required, it also provided that: (1) the faculty association could present recommendations on the reduction, (2) the administration and faculty association would meet to develop a satisfactory process for reduction, (3) affected employees would receive at least a 45 day notice prior to the effective date of their termination, and (4) affected employees would have recourse to the grievance procedure.[7]

---

[7]. Agreement, Section VI, part X, provides:

1. The Faculty Association recognizes the exclusive right of the Board of Trustee (sic) to determine reductions in personnel and/or operations and the exclusive right to determine the area in which such reductions will be made subject to the provisions contained within this Agreement.

2. During a period of impending layoff, the Board agrees to attempt to accomplish staff reductions by natural attrition (such as resignation, retirement, etc.) and will consider requests for voluntary leaves of absence without pay.

3. Prior to any reduction in staff within the M.A.H.E. unit, the Faculty Association will be provided an opportunity to present recommendations to the President or his/her designated representative(s) and the Board of Trustees regarding such reductions for consideration prior to the final decision.

4. Once it has been determined that a reduction in staff is necessary, representative from the Faculty Association and the Administration will meet in an attempt to develop a mutually satisfactory process of reducing staff. Criteria to be considered prior to a staff reduction may include, but will not be limited to:

-length of service of the faculty member at L.C.C.

Plaintiffs allege that Arganian and Taylor did not receive constitutionally adequate procedural safeguards. Both Arganian and Taylor grieved through binding arbitration. The arbitration decision determined that Arganian and Taylor received all of their rights under the Agreement. It further determined that not evidence existed to support the allegations that LCC arbitrarily or capriciously determined the existence of a financial exigency or selected Arganian and Taylor, or that LCC retaliated against Taylor and Arganian for their criticism of LCC. Upon its review of the pleading, motions, affidavits, and depositions, this Court also determines that no material issue of fact exists as to whether Arganian and Taylor received all on their contractual rights under the grievance procedure.

-institutional needs and program priorities,
-budgetary restrictions,
-enrollment trends,
-interdisciplinary adaptability.

5. Personnel affected by the reduction in staff will be afforded as much notice as possible, but in no event less than forty-five (45) calendar days, prior to the effective date of layoff. Faculty members to be laid off will be informed of existing vacancies for which they may qualify and will be encouraged to apply. The College shall make every effort to place that member in another position within the College for which he/she is qualified.

6. For a period of one year from the effective date of the layoff, no new personnel will be hired to fill the position vacated because of a layoff until after the laid off employee has been offered the opportunity to return to this vacated position.

Even though the Agreement's procedural safeguards were observed, the critical issue is whether the requirements of constitutional due process were observe. Plaintiffs assert that under Loudermill v. Cleveland Board of Eucation, 470 U.S. 532 (1985) LCC was required to provide Arganian and Taylor with a pretermination hearing. Loudermill involved a publicly employed security guard who was fired for failing to disclose a felony conviction on his employment application. The Court in Loudermill, required a pretermination hearing as a "right of reply" properly required in the context of a disciplinary, just cause termination. The purpose of the hearing is not to "definitively resolve the propriety of the discharge." Loudermill, at 545. Rather, the hearing's purpose is limited. "It should be an initial check against mistaken decisions--essentially, determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-46. Further, in Loudermill v. Cleveland Board of Education, 844 F.2d 304, 312 (6th Cir. 1988) (on rehearing), the lower Court stated:"Indeed, courts construing the Supreme Court's language in Loudermill have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place." The purpose and rationale of a Loudermill hearing do not apply properly to a

nondisciplinary reduction in staff executed only after extensive administrative review and replete with grievance procedures.

In the present case the Board notified Arganian and Taylor on July 22, 1983, of their terminations, which would become effective 45 days later. Arganian and Taylor grieved their termination through several levels to binding arbitration. Normally the first level grievance proceeding would have occurred before the effective date of the terminations and satisfied any Loudermill requirement. But Arganian's and Taylor's union representative, Barbara Roberts Mason, requested an extension of the time for filing their grievances. Thus, if a Loudermill, hearing was required before the effective date of the terminations, it was available to Arganian and Taylor, but delayed due to the actions of their union representative. Moreover, both Arganian and Taylor briefly met with Ronald Dove, personnel director of LCC, to discuss matters related to their layoffs before the actual effective date.

After considering the property interests of Arganian and Taylor, the risk of an erroneous determination, and the LCC's interest in efficient administration, this Court determines that Arganian and Taylor received all the constitutional due process required for terminations of governmental employment in the context of a reduction in staff. Arganian

and Taylor had a legitimate expectation of continued governmental employment under the continuing contract provisions of the Agreement. The Agreement provided extensive procedural safeguards to protect this interest against mistaken deprivation. In a reduction in staff situation under the Agreement both the employees' faculty association and collective bargaining unit had extensive predeprivation input into the reduction process. Further, under the Agreement affected employees received notice 45 days before the effective date of termination. Moreover, affected employees had recourse to an extensive grievance procedure that included arbitration. Also, the first level proceeding of the grievance procedure was normally available before the effective date of the termination. The grievance procedure specified in the Agreement satisfied the requirements of constitutional due process to protect the property of public employees who are terminated in a reduction in staff. Cf. Ash v. Board of Education of Woodhaven School District, 699 F.2d 822, 827-28 (6th Cir. 1983); Bignall v. North Idaho College, 538 F.2d 243, 245-46 (9th Cir. 1976); Klein v. Board of Higher Education, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977); Johnson v. Board of Regents, 377 F. Supp. 227, 236-40 (W.D. Wis. 1974).

In addition to the property interest in continued government employment, plaintiffs also claim that LCC

deprived Arganian and Taylor of their vocational liberty interests without due process. This interest is implicated where the manner of termination "might seriously damage [an employee's] standing and association in the community . . . or impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Under Lake Michigan College federation of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 1097-98 (6th Cir. 1975), plaintiffs must demonstrate "that a definite range of opportunities is no longer open to them." Termination alone simply does not abridge this interest.

Plaintiffs claim that Taylor's vocational liberty interest was infringed during Taylor's appearance on a radio talk show on June 5, 1985, almost two years after the terminations when Gannon called in and indicated that Taylor was not a good teacher. Further, plaintiffs argue that David Froh, chairperson of the LCC Board, infringed the vocational liberty interest of both Arganian and Taylor by a comment reported in a local newspaper, that evaluations were weighted more heavily than other criteria to layoff full-time LCC faculty. (Affidavit of Dennis Meier, attached exhibit I-2).

These remarks are simply legally and factually

insufficient to support a claim for deprivation of liberty incident to termination by Taylor. Bishop v. Wood, 426 U.S. 341, 448-49 (1976). Lake Michigan, supra. Plaintiffs have not demonstrated that the LCC administrators laid off Arganian and Taylor in a manner that foreclosed their "freedom to take advantage of other employment opportunities" or "that a definite range of opportunities is no longer open to them." Lake Michigan, at 1098.

2. Substantive Due Process

Arganian and Taylor also assert that their substantive due process rights under the Fourteenth Amendment were abridged in their layoff. In Jeffries v. Turkey run Consolidated School Dist., 492 F.2d 1, 3-4 (7th Cir. 1974). The court defined substantive due process:

> The claim that a person is entitled to "substantive due process" means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary."

In Brenna v. Southern Colorado State College, 589 F.2d 475, 477 (9th Cir. 1976), the court elaborated on the standards of substantive due process in the context of termination of tenured employees:

> [T]he Fourteenth Amendment does not require that [the college] use any particular selection process, so long as

> the procedure chosen is a reasonable one. The Fourteenth Amendment does not prohibit all state deprivations of property but only those which are effectuated without due process of law. The term "tenure," in the constitutional context, merely provides appellant with a property interest. "Substantive" due process requires only that termination of the interest not be arbitrary, capricious, or without a rational basis.
>
> ...
>
> Appellant argues that... there is an implied condition that non-tenured faculty must be terminated before tenured if there is work which the tenured faculty member is capable of performing....It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was arbitrary or capricious.

Challenged governmental conduct violates an individual's right to substantive due process when it is arbitrary, capricious, and without a rational basis.

In the present case Dean Kintzer's unrefuted deposition testimony indicates that he selected Arganian and Taylor for layoff based on the three criteria. The three criteria were: (1) enrollment decline, (2) full-time to part-time faculty ratio, and (3) personal evaluations. Kintzer selected these three as most relevant to his division from the list of criteria that was mutually approved by LCC and the employee bargaining unit representatives, including Taylor for the MAHE.

Plaintiffs allege that the criteria were applied

arbitrarily and capriciously. However, no material issue of fact exists as to whether the three criteria were not applied without a rational basis. Plaintiffs do not appear to factually dispute the accuracy of the departmental enrollment decline or calculation of the full-time to part-time faculty ratios. Plaintiffs do assert that the student evaluation component of the professional evaluation was arbitrary and capricious. But no material issue of fact exists as to whether the use of the personal evaluations had a rational basis. The approved list of 14 criteria included personal evaluations. Further, the student component of the evaluation constituted only 40% of the evaluation. Moreover, the student evaluation component had constituted part of the personal evaluation for several years and originally had been implemented only after consultation and study by the administration and faculty association.

Plaintiffs further argue that a public academic employer must act not only on a rational basis but also in good faith when it terminates tenured faculty in a reduction in staff during a financial exigency. Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Lewitt v. Board of Trustees of Nebraska State College, 376 F. Supp. 945 (Neb. 1974). A danger exists that unscrupulous administrators under the guise and pretext of an economic layoff disingenuously could terminate unwanted "unpopular or

controversial or misunderstood" tenured employees who could not be discharged otherwise except for cause. In Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975).

In determining the presence of good faith, the court in American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 136 N.J. Super. 442, 346 A.2d 615, 618 (1975), identified the crucial issue as whether the "purported action was in good faith related to a condition of financial exigency within the institution." The Krotkoff court further suggested that the "existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets." Krotkoff, at 681.

Defendants have extensively supported their motion with documents and affidavits, relying primarily on the affidavit of Bruce Newman, the Business Manager of LCC, delineating the basis of the financial exigency confronting LCC prior to the disputed terminations. In March 1983 the pending deficit facing LCC for fiscal year 1983-84 was $1,674,000. Plaintiffs do not appear to factually challenge the existence of a budget deficit of that magnitude. Rather, plaintiffs simply seem to ignore the factual basis of the deficit and argue:

> In spite of the deluge of financial data the defendants have presented to the court, there is only one figure that is relevant, that is, the final amount of money the college needed to prevent termination of faculty. Factually, LCC is claiming that it need[ed] to terminate tenured faculty contracts because of a budget short fall of $343,270 [affidavit of Bruce Newman, page 11, paragraph 44]. This amount is out of a budget of 30.75 million, and represents less than 1% of the total proposed resource target budget.

(Plaintiffs' Brief in Opposition to Defendants Motion for Summary judgment, at 41.) Plaintiffs are mistaken. All of the figures are relevant in determining the good faith of defendants' assertion that a financial exigency existed. Plaintiffs's focus on the figure of $343,270, ignores the extensive remedial financial measures taken by LCC. No factual dispute appears as to whether initially a pending budget deficit of $1,674,000 existed prior to the disputed terminations. Further, this Court notes that the Agreement granted LCC the exclusive right to determine reductions in personnel. Accordingly, this Court concludes that no issue of material fact ixists (sic) as to whether LCC acted fully within its rights under the agreement by reducing staff in response to an actual financial exigency.

This Court determines that plaintiffs' due process claims, both procedural and substantive, cannot survive defendants' motion for summary judgment. Specifically, this Court finds that both Arganian's and Taylor's property

interests in continued governmental employment at LCC arose out of the collective bargaining agreement between LCC and MAHE. Further, this Court finds that Arganian and Taylor received constitutionally adequate due process under the Agreement's provisions for reductions in staff. Moreover, this Court finds that the selection method for termination had a rational basis and that the determination of a financial exigency did not violate the substantive due process rights of Arganian and Taylor. Accordingly, this Court grants summary judgment as to Count I of plaintiffs' Complaint alleging violation of Arganian's and Taylor's due process rights.

B. FIRST AMENDMENT

Plaintiffs allege that defendants abridged Taylor's First Amendment rights claiming that Taylor was laid off because of Taylor's criticism of Gannon and Taylor's union activity in behalf of MAHE. Specifically, plaintiffs allege that Gannon "designated" Taylor for termination (Complaint, paragraphs 75, 76, 77).

Claims of adverse employment decisions in retaliation for exercise of First Amendment rights are evaluated under a three step analysis. First, plaintiffs must demonstrate that Taylor's activity was constitutionally protected. Second, plaintiffs must show that the protected activity was a substantial or motivating factor in the adverse determina-

tion. Third, if plaintiff establishes the first two elements, then the burden of proof shifts to the defendant employer who must prove that adverse decision would have occurred even absent the protected conduct. Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City School district Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968); Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988); Ratliff v. Wellington Exempted Village School Board of Education, 820 F.2d 792 (6th Cir. 1987); Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983); Reichert v. Droud, 701 F.2d 1168 (6th Cir. 1983); Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (1981); Anderson v. Evans, 660 F.2d 153 (1981); Columbus Education Association v. Columbus School District, 623 F.2d 1155 (1980). Courts have further analyzed the threshold element of demonstrating the existence of constitutionally protected conduct. In both Pickering and Connick the Court determined that generally no constitutional protection is available if the employee has spoken on only "matters of personal interest." However, if the public employee has spoken as a citizen on "matters of public concern" then the court must balance the competing interests of the public employee as a citizen commenting on matters of public concern and of the public employer in

promoting institutional efficiency.

Plaintiffs allege that Taylor criticized the practices and policies of Gammon and LCC as a concerned citizen and a union official, commenting on matters of both public and union concern. This Court will assume that plaintiffs have established that Taylor's conduct was constitutionally protected, without any further balancing of the competing interests. Connick, Pickering, Columbus Education Association, supra, at 1160; Hickman v. Valley Local School District, 619 F.2d 606, at 609 (6th Cir. 1980). However, this Court cannot similarly assume that the protected conduct was a substantial or motivating factor for the adverse action.

Defendants assert that no evidence exists indicating that Gannon had any part in selecting Taylor for termination. Further, defendants contend that Gannon was isolated from the selection process by a four person review team and that Kintzer alone made the recommendation to terminate Taylor based solely on criteria which Taylor had himself agreed to on behalf of MAHE in the July 8, 1983, memorandum. In response, plaintiffs present affidavits and deposition testimony generally indicating that Gannon was vindictive and did not like either Taylor or the unions at

LCC, and that Taylor was also an outspoken (sic) of Gannon.[8]

---

[8] For example, by way of response, plaintiffs argue at pp. 61 ff. of their brief in opposition to defendants' motion for summary judgment:

> Raymond Riskey testified by way of Discovery deposition. When asked if he had any knowledge that President Gannon directed that Plaintiffs be laid off he answered: "I am assuming that he did." (Riskey Dep. p. 9). He further answered as follows: I think that those people were, along with perhaps having higher salaries, I think a number of them were not well liked by President Gannon." (Riskey Dep. p. 10) When asked whether he considered Ed Taylor an outspoken critic of President Gannon and the Board of Trustees' policies, Riskey responded: "I would say that would be an accurate, but mild description, but yes, he was an outspoken critic." When asked to knowledge in the history of Lansing Community College had there been a more outspoken critic of President Gannon and the Board of Trustees than Ed Taylor, Riskey responded: "At this point I would have to say no, but I am fast approaching that myself" (Riskey Dep. p. 21).
>
> Further, when asked his opinion as to whether or not Edward Taylor was laid off or terminated from L.C.C. because he was Union President or for his Union activities, Riskey responded: "I believe he was. I believe that he said things, did things, that angered the President. I think that he was not well liked by Dean Kintzer. I think being Union President and being laid off, terminated, would be a pay back for the Union having been on strike in 1978, and Edward was very active, as I remember, during that strike." (Riskey Dep. p.22) When asked why he believed the lay-off of Ed Taylor in 1983 was a pay back for something that happened in 1978, Riskey responded: "My perception is that President Gannon doesn't forget when people cross him and say things he doesn't like, are critical of him, that he has got a long memory." When asked how he would classify the relationship between Philip Gannon and Edward Taylor prior to the lay-off, Riskey responded: "Very adversarial, a lot of hostility." (Riskey Dep.

Whatever else such testimony does, it does not constitute probative evidence that Gannon "designated" and "selected" Taylor for termination because of Taylor's union activity and his outspoken criticism of Gannon. After a through review of the pleading, affidavits, and other documents in the record, this Court determines that no issue of material fact exists as to whether Gannon did not designate Taylor for termination because of Taylor's union activity and

---

p. 23) When asked if he has witnessed any hostility by Philip Gannon either against Ed Taylor or the Union, Riskey responded: "Hostility takes many forms. . . . It is my perception that the Social Science Department has suffered over the years because we have had so many Union leaders, the difficulty in obtaining replacements for positions, of getting new positions, of, as it appears to me, having to fight harder for it, for everything that came easier for departments that were not nearly as outspoken. I attribute a lot of that in terms of --I see that as hostility directed at MAHE in a sense, because so many leaders have come from that department." (Riskey Dep. 23) When asked how he would characterize Philip Gannon's leadership, Riskey responded: "I have been quoted in newspapers within the last few months as saying that he has ruled L.C.C. with an iron fist, very authoritative, authority oriented, hard, and I think that image of the iron fist is how I would see him. So I would put him at that very aggressive end of the continuum in terms of the leadership. When he see something that he wants he goes for it, and anything that gets in the way is too bad." (Riskey Dep. p. 25)

Although this type of deposition testimony may be good dramatic speculation, it is not particularly probative evidence that Gannon actually designated Taylor for termination because of Taylor's union activity and Taylor's outspoken criticism of Gannon personally.

criticism of Gannon. Accordingly, this Court grants summary judgment as to Count II of plaintiffs' complaint alleging violation of Taylor's First Amendment rights.

C. PENDENT CLAIMS

Both claims under the Michigan Wrongful Death Act and the Michigan Elliott-Larsen Civil Rights are pendent state claims. Since this Court has determined to grant defendant's motion for summary judgment as to the sec. 1983 claims in counts I and II, this Court dismisses both pendent state claims.

D. QUALIFIED IMMUNITY

Defendants assert that they are immune from suit under the holding of the Court in Harlow v. Fitzgerald, 457 U.S. 800 (1978), that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory of constitutional rights of which a reasonable person would have known." See Procunier v. Navarette, 434 U.S. 555 (1978). In the context of summary judgments, the court in Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), stated:

> If the undisputed facts show that defendant's conduct, as a matter of law, did not violate clearly established legal rights, then the district court must grant the defendant summary judgment on the basis of qualified immunity. . . .Thus, for example, the defendant is entitled to summary judgment if discovery fails to

> uncover evidence sufficient to create a genuine issue as to the truth of the allegations that the defendant in fact committed acts that violate clearly established law.

Poe, at 425. In remanding the case before it, the Poe court provided the lower court a standard:

> [W]hether based on all the undisputed evidence before the court, a reasonable official in the position of each [defendant] could have believed his or her conduct to be lawful, considering the state of the law when he or she took the challenged action.

In the present case the reduction in staff was a discretionary function within the scope of the defendants' authority under the terms of the Agreement. This Court's preceding analysis determined that plaintiffs failed to present sufficient probative evidence supporting the truth of their allegations that defendants violated Arganian's and Taylor's due process and First Amendment rights in laying them off. Reasonable officials in the positions of defendants could have believed their conduct to be lawful in laying off Arganian and Taylor under the reduction in staff provisions of the Agreement utilizing the list of criteria mutually approved by the unions and administration.

CONCLUSION

In accordance with the preceding analysis, this Court grants defendants' motion for summary judgment on Counts I and II of plaintiffs' Complaint and dismisses Counts III and IV for lack of jurisdiction. Additionally, this Court grants

defendants summary judgment as to Counts I and II on the basis of qualified immunity.

Dated: April 24, 1989

S/_____
HON. ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually

Plaintiffs,

V.

G86-661-CA5
HON. ROBERT HOLMES BELL

PHILIP J. GANNON, individually and as President of Lansing Community college (sic), and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, individually, jointly, and severally,

Defendants.

JUDGMENT

In accordance with the preceding analysis, this Court grants defendants' motion for summary judgment on Counts I and II of plaintiffs' Complaint and dismisses Counts III and IV for lack of jurisdiction. Additionally, this Court rants defendants summary judgment as to Courts I and II on the basis of qualified immunity.

Dated: April 24, 1989

S/
HON. ROBERT HOLMES BELL
UNITED STATE DISTRICT COURT JUDGE

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

92-1246

NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX II (pages 83-120)

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
26316 Telegraph Rd
P.O. Box 697
Flat Rock, MI 48134

TABLE OF CONTENTS

Page

Johnston-Taylor, Et. Al., v. Gannon, Et. Al.,
(W.D. Mich., Hon. Richard Enslen).....83-a

David Arganian v. Lansing Community College, Et. Al.,
(Circuit Court, Mich, Hon. Robert Holmes Bell)...100-a

David Arganian v. Lansing Community College, Et. Al.,
Circuit Court, Mich,
Hon. Robert Holmes Bell)
Order Staying Discovery.....118-a

Petitioners Letter Of Termination, July 22, 1983.....120-a

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. G 86-661

PHILIP J. GANNON, individually and as President of Lansing Community College, LANSING COMMUNITY COLLEGE, and THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.

OPINION

This action concerns defendants' decision to dismiss the deceased father and spouse of the Taylor plaintiffs, Edward Taylor, and David Arganian as full-time professors at Lansing Community College. The Taylor plaintiffs have sued both on their own behalf and, with regard to Sallie Elizabeth Johnston-Taylor, as administratrix of the estate of Edward Taylor, alleging that defendants' actions violated their constitutional rights and the constitutional rights of

Edward Taylor under the due process clause of the fourteenth amendment and under the first amendment, as incorporated by the fourteenth amendment. They also allege violations of the Michigan Wrongful Death Statute and the Michigan Elliot-Larsen Civil Rights Act. The Arganian plaintiffs allege violations of their due process rights and of the Elliot-Larsen Civil Rights Act. Presently before the Court for decision is defendants' November 6, 1986 Motion to Dismiss Portions of Plaintiffs' Complaint. For the reasons discussed below, the Court will grant such motion in part and will deny it in part.

Facts

Edward Taylor and David Arganian were both long-time members of the faculty of Lansing Community College ("LCC"). Mr. Arganian began teaching at LCC on September 11, 1961, and Mr. Taylor began teaching at LCC on September 5, 1966. In July 1965, according to plaintiffs' complaint, LCC established a separate governing Board of Trustees. Prior to that time, the college apparently was subject to the direct authority of the Lansing School District. Plaintiff David Arganian alleges that on or about June 7, 1967 the college granted him tenure, evidently by making him an Associate Professor. Both Mr. Taylor and Mr. Arganian allege, moreover, that they received tenure, or at least a "reasonable expectation of continued employment until age

70, unless discharged for just cause" (Complaint, sec. 19), under a collective bargaining agreement the college entered into with the Michigan Association for Higher Education ("MAHE") in 1981. Mr. Taylor was the president of the MAHE from 1964-1970, 1971-1972, and 1981-1984, and in that position was the chief negotiator for the union during the 1981 contract negotiations. Plaintiffs allege that Mr. Taylor also was "the leading critic of all defendants policies and practices," id. sec. 68, and in particular strongly opposed the layoffs that led to plaintiffs' present action.

In 1983 LCC found itself in financial difficulty and had to make budget cutbacks. Plaintiffs allege that in June 1983 defendant Gannon ordered the deans of the college's divisions to select faculty for termination as full-time employees of the college. Plaintiff David Arganian learned on or about July 26, 1983 that his dean had selected him for termination of employment, allegedly because he was not an effective teacher. Mr. Taylor's dean apparently did not select him for termination, but defendant Gannon allegedly overrode the dean's decision and selected Mr. Taylor for termination of employment. The Board of Trustees made the final decison to terminate Mr. Arganinan's and Taylor's status as full-time professors at its July 1983 meeting. Plaintiffs allege that neither Mr. Arganian nor Mr. Taylor received any kind of pre-termination hearing at which they

could have challenged the Board's decision to discharge them from full-time status. Both professors apparently were offered the opportunity to continue teaching at the college on a part-time basis.

The MAHE did file a grievance on the professors' behalf challenging the Board's decisions. On December 19, 1984 an arbitrator decided that the Board's decisions were proper under the collective bargaining agreement. The arbitrator, noting that the issues before him were "contractual rather than statutory or constitutional in nature," Decision at 12, considered whether "the Board honestly concluded that there was a budget problem and made an honest judgment that a staff reduction would provide a solution or part of a solution consistent with sound financial management and the educational objectives of the College." Id. He concluded that the Board acted in good faith, id. at 15; that the Board gave adequate notice of its intent to lay-off the affected professors, id.; that the MAHE had adequate input into the decision-making process, id. at 16-17; and that the Board properly formulated and applied criteria for deciding who should be laid-of. Finally, the arbitrator concluded that neither Mr. Arganian nor Mr. Taylor had been discriminated against in violation of the collective bargaining agreement. In particular, he concluded that Mr. Taylor had not been laid-off because of his union activities.

On July 8, 1986 plaintiffs filed a four-count complaint challenging defendants' actions. Count I of the complaint is brought pursuant to the provisions of 42 U.S.C. sec. 1983, and alleges that defendants' actions violated plaintiffs' procedural and substantive due process rights. Specifically, plaintiffs argue that defendants' decisions to lay-off David Arganian and Edward Taylor were arbitrary and capricious, and that defendants unlawfully denied these professors their right to a pre-termination hearing. Count II is brought solely on behalf of the Taylor plaintiffs. They argue that defendants violated Mr. Taylor's first amendment rights because they decided to lay him off in reprisal for his union activities. Plaintiffs further allege that as a result of defendants' actions, Mr. Taylor committed suicide. Count III is a state-law wrongful death claim brought on behalf of the Taylor plaintiffs. Finally, in count IV both the Taylor plaintiffs and the Arganian plaintiffs allege that defendants discriminated against Mr. Taylor and Mr. Arganian on account of their age in violation of Michigan's Elliot-Larsen Civil Rights Act.

Standard of Review

Since defendants bring their motion pursuant to rule 12(b) (6) of the Federal Rules of Civil Procedure, I cannot grant it unless "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which

would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering the sufficiency of plaintiffs' claims, moreover, I must accept all well-pleaded allegations of their complaint at face value and must construe them in the light most favorable to the plaintiffs. Scheur v. Rhodes, 416 U.S. 232,236 (1974); Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1182 (6th Cir. 1975).

Discussion

Defendants raise eight (8) grounds in support of their motion to dismiss. The Court will discuss them in the order they are presented in defendants' brief.

Defendants' first ground for dismissal is that the Taylor plaintiffs, in their individual capacities, and plaintiff Lillian Arganian lack standing to bring this suit. With regard to the Taylor plaintiffs, defendants argue that these plaintiffs are in essence bringing claims on Mr. Taylor's behalf and that under Michigan law only the personal representative of Mr. Taylor's estate has standing to bring such claims. M.C.L. 600.2922. Defendants further argue that in count I of the complaint, the Taylor plaintiffs, in their individual capacities, and plaintiff Lillian Arganian are improperly attempting to assert the rights of third parties, i.e., plaintiff David Arganian and Mr. Taylor. Plaintiffs respond that they are merely attempting to assert their right to recover for the losses they have suffered because of

defendants' actions.

The Court will dismiss the claims of the Taylor plaintiffs, in their individual capacities, with regard to count IV of the complaint. Plaintiff Ms. Johnston-Taylor may pursue her claim in count IV as representative of the estate of Edward Taylor, and the Arganian plaintiffs may also pursue their claims in count IV. I must dismiss the other plaintiffs' claims under Count IV, however, because such claims are brought to assert the right of Mr. Taylor and plaintiff David Arganian, and thus with regard to Mr. Taylor can be brought only by the personal representative of his estate. M.C.L. 600.2922(2); Herbert v. Cole, 115 Mich. App. 452 (1982). This same holding applies to count III of the complaint.

Finally, I will deny, without prejudice, defendants' motion with regard to counts I and II because there is some case law supporting the right of the Taylor plaintiffs and of plaintiff Lillian Arganian to pursue these claims on their own behalf to recover for the injuries they have suffered because of defendants actions. Compare Bell v. City of Milwaukee, 746 F.2d 1205, 1241-53 (7th Cir. 1984) with Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986). Specifically, these plaintiffs may be able to argue that defendants' actions have deprived them of their constitutionally protected liberty interest in the continued companionship, comfort, and

support of their husbands and parent. I will decline to decide this standing issue now because it was not adequately briefed by the parties. Defendants are free, however, to renew their motion to dismiss the claims of the Taylor plaintiffs, in their individual capacities, under counts I and II, and the claim of plaintiff Lillian Arganian under count I, when they are prepared to submit a thorough brief on the issue. I note here that this issue does not affect the right of plaintiff Ms. Johnston-Taylor to pursue her claims under counts I and II as the personal representative of the estate of Edward Taylor, or the right of plaintiff David Arganian to pursue his claims under count I on his own behalf.

Defendants' second ground for dismissal is that the Court should dismiss plaintiffs' claims against LCC, the members of the Board of Trustees in their individual capacities, and Mr. Gannon because these defendants lacked the power to terminate or to lay-off Mr. Taylor and Mr. Arganian. Defendants argue that pursuant to Michigan law, only the Board of Trustees has the power to take such personnel actions. See M.C.L. 389.124(b); Blanchard v. Lansing Community College, 142 Mich. App. 446, 449 (1985). The Court will grant defendant's motion with regard to LCC, and will deny it with regard to the remaining defendants. I grant the motion with regard to LCC because plaintiffs have failed to demonstrate how the college, as an entity, can be

held liable for their injuries. I will deny the motion with regard to the board members because it is clear that each member voted as an individual, and the parties have failed to discuss any distinctions the Court should make between the actions of the board members in their individual capacities and their actions in their official capacities.

Finally, I will deny the motion with regard to defendant Gannon because it is unclear what role he played in the decision-making process. I am not sure that he is immune from liability simply because the Board of Trustees had the ultimate authority to retain or to discharge Mr. Taylor and Mr. Arganian. See van Houdnos v. Evans, 807 F.2d 648, 653-54 (7th Cir. 1986). Plaintiffs allege, for example, that defendant Gannon"singled out Plaintiffs decedent Taylor for termination because of his union activities and exercise of his first amendment rights." Complaint, sec. 49. If true, this allegation could state a claim against defendant Gannon even though the Board had the final decision-making authority because defendant Gannon's actions would have been a casual factor in producing an unconstitutional result. Defendants may renew this aspect of their motion when they are prepared to establish uncontested facts demonstrating Mr. Gannon's entitlement either to dismissal or to a judgment in his favor.

Defendants next claim that they are entitled to the

defense of qualified immunity under the Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982). In Harlow, the Supreme Court held that a government official is entitled to immunity from a suit raising claims for monetary relief if the actions at issue did not "'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Davis v. Scherer, 82 L. Ed.2d 139, 147 (1984), quoting Harlow, 457 U.S. at 818. Under this standard, "[w]hether an official may prevail in his qualified immunity defense depends upon 'the objective reasonableness of [his] conduct as measured by reference to clearly established law.'" Id. (citation omitted). Defendants base their motion for qualified immunity on two factors. First, they argue that plaintiffs have failed to specify the bases for their claims. Second, they argue, in essence, that they acted in good faith.

The Court will deny defendant's motion without prejudice. I find that plaintiffs have raised three clearly defined and well-established constitutional claims: (1) that defendants' actions were arbitrary and capricious and thus violated plaintiffs' substantive due process rights; (2) that Mr. Taylor and Mr. Arganian had a constitutionally protected property interest in not being dismissed except for just cause, and that defendants acted illegally by failing to provide them with a pre-termination hearing or otherwise to

protect their due process rights; and (3) that defendants violated Mr. Taylor's first amendment rights by discharging him because of his union activities. I believe in particular that plaintiffs have adequately stated a claim that defendants violated their procedural due process rights. It may be that Mr. Taylor and Mr. Arganian had no constitutionally protected property interest in their continued employment with LCC. Defendants have failed, however, to provide me with the materials, such as a copy of the collective bargaining agreement, that I would need to make this determination, and I cannot accept their implicit argument that any deprivation that may have occurred was de minimus. It appears that at a minimum, Mr. Taylor and Mr. Arganian were reduced from full-time to part-time status. I regard this reduction as significant enough to trigger the protections of the due process clause. Compare Carter v. Western Reserve Psychiatric Habilitation Center, 767 F2d 270, 272 n.1 (6th Cir. 1985). With regard to plaintiffs' other claims, once again, accepting the allegations of the complaint as true, I find no basis for recognizing defendants' claim of qualified immunity, at least at this time. Defendants may renew their claim when they are prepared to discuss the relevant case law and the facts of this case in detail.

Defendants' fourth argument is that the Eleventh Amendment bars plaintiffs' claims. Defendants argue that

LCC is an arm of the state, that the individual defendants are state officers and employees, and that any judgment plaintiffs may recover would be paid out of state funds. In support of their argument, defendants cite and discuss a number of state laws indicating that the state exerts a significant amount of control over LCC and provides a significant portion of its operating budget. The Court, however, will decline to grant defendants' motion, at least at this time. The Sixth Circuit has indicated that the determination of whether a government entity is an arm of the state entitled to Eleventh Amendment immunity is essentially factual in nature and requires a court to consider a number of factors. Hall v. Medical College of Ohio, 742 F.2d 299, 301-07 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985); see also Hutchins v. Board of Trustees of Michigan State University, 595 F. Supp. 862, 863-68 (W.D. Mich. 1984). Defendants' argument may well have merit. I am hesitant, however, to decide this significant Eleventh Amendment immunity issue on the basis of the incomplete record before me, and thus will decline to grant defendants such immunity at this time. Defendants should raise this defense either at trial or by a properly supported motion for summary judgment.

The fifth argument defendants raise is that plaintiffs' claims are barred by the doctrines of res judicata and

collateral estoppel because of the arbitrator's decision. The Court must reject this argument because the Supreme Court has ruled, in an unanimous decision, that the decision of a labor arbitrator made pursuant to a collective bargaining agreement cannot bar a subsequent claim for relief under section 1983. McDonald v. West Branch, 466 U.S. 284, 292 (1984). The Supreme Court analyzed the features of an arbitration proceeding under a collective bargaining agreement in McDonald, and concluded that "[i]t is apparent...that in a sec. 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." Id. The arbitral decision may, however, be admitted as evidence in the section 1983 action. Id. n. 13. I do not believe that the Supreme Court implicitly overruled McDonald in University of Tennessee v. Elliot, 92 L. Ed.2d 635 (1986). The Supreme Court never discussed McDonald in Elliot and, more importantly, Elliot concerned a decision reached by a state administrative law judge as opposed to a labor arbitrator. I also cannot accept, at least at this time, defendants' argument that Mr. Taylor's and Mr. Arganian's due process rights were either non-existent or fully satisfied in this instance. As I indicated previously, neither party has provided me with the documents I need to decide this issue. I also note that if plaintiffs did enjoy constitutionally protected property interests, then I must resolve the issue of

what process they should have received by applying constitutional principles and not the terms of the collective bargaining agreement. See Cleveland Board of Education v. Loudermill, 84 L. Ed.2d 494, 503 (1985).

Defendants' sixth argument is that Michigan's doctrine of governmental immunity bars Count III of the complaint, which is the Taylor plaintiffs' claim under the wrongful death statute. See Ross v. Consumers Power Co., 420 Mich. 567 (1984). I believe that defendants' argument has merit with regard to plaintiffs' claim against the Board as an entity. In Ross, The Michigan Supreme Court held that "[a]ll governmental agencies (state and local) are immune from tort liability for injuries arising out of the exercise or discharge of a non-proprietary, governmental function." Ross, 420 Mich. at 591. Operation of the college clearly is a governmental function, and the Board thus is entitled to claim immunity from count III.

The Court does not believe, however, that there are sufficient facts in the record for it to decide whether the individual defendants may also claim governmental immunity. The Michigan Supreme Court held in Ross that individual employees "are immune from tort liability only when they are a) acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority; b) acting in good faith; and c)

performing discretionary-decisional, as opposed to ministerial-operational, acts." Id. at 592. I believe that the individual defendants probably could satisfy the first and third prongs of this standard. There is insufficient evidence in the record, however, for the Court to determine whether they acted in good faith, and I thus will deny their motion.

Defendants further argue that count III is barred by the exclusive remedy provisions of the workers' compensation statute since Mr. Taylor's suicide allegedly resulted from defendants' employment related actions. See M.C.L. 418.13-1(1). The Court rejects this argument. Since a wrongful death act claim is derivative in nature, to decide this issue the Court must examine whether the workers' compensation statute would bar Mr. Taylor from pursuing the substantive claim on which count III is based if he were still alive. See Barnes v. Double Seal Glass Co., 129 Mich. App. 66, 70-71 (1983). Since the wrongful death claim is based on defendants' alleged violations of Mr. Taylor's constitutional rights and his rights under the Elliot-Larsen Civil Rights Act, it is not barred by the workers' compensation statute. If Mr. Taylor were alive, he could pursue such claim on his own behalf. See Napier v. Jacobs, 145 Mich. 285, 302 (1985). The Taylor plaintiffs thus should be free to pursue their wrongful death claim.

Defendants' final argument is that the Court must

dismiss count III because Mr. Taylor's death occurred almost three years after the allegedly wrongful lay-off and thus could not have been caused by the lay-off. The Court must reject this argument. In ruling on a 12(b) (6) motion, I must accept plaintiffs' allegations as true. Defendants' argument may have merit. They should raise it, however, either at trial or by a motion for summary judgment.

The Court will enter an order in accordance with this opinion.

Dated in Kalamazoo, MI: April 9, 1987

S/_____

RICHARD A. ENSLEN

U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. G 86-661

PHILIP J. GANNON, individually and as President of Lansing Community College, LANSING COMMUNITY COLLEGE, and THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

ORDER

In accordance with the opinion dated April 9, 1987;

IT IS HEREBY ORDERED the defendants' Motion to Dismiss is GRANTED in part and DENIED in part;

IT IS FURTHER ORDERED that defendant Lansing Community College is DISMISSED from this action.

Dated in Kalamazoo, MI April 9, 1987

S/_____
RICHARD A. ENSLEN, U.S. DISTRICT JUDGE

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DAVID ARGANIAN,
Plaintiff,
vs File No. 83-50768-CL
HON. ROBERT HOLMES BELL

LANSING COMMUNITY COLLEGE, THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, PHILIP J. GANNON, President, and SAM KINTZER, Divisional Dean, Lansing Community College,

Defendants

OPINION AND ORDER OF THE COURT

Subsequent to their answer to plaintiff's first amended complaint, defendants have submitted to the Court joint motions for accelerated judgment and summary judgment. As to those portions of plaintiff's claim which are based on statutory and contractual rights, defendants contend they are entitled to accelerated judgment for the reason that plaintiff has not exhausted his administrative remedies. Conjunctively, defendants have moved for summary judgment, contending that, to the extent plaintiff has attempted to make out a claim in tort, he has failed to

state a claim upon which relief can be granted.

For purposes of these motions, most of the facts are not at issue. It appears that plaintiff, David Arganian, was hired by the Lansing Board of Education to teach at Lansing Community College (LCC) in 1961. From that time forward, plaintiff served LCC continuously as teacher and temporarily as department chairperson until July 26, 1983, when he was notified that he wold not be offered a contract for the 1983-1984 academic year. Plaintiff's "dismissal" was part of a staff reduction effort purportedly made necessary by the worsening financial status of LCC. In addition, plaintiff was allegedly informed by oral statement of Ronald Dove, Personal Director, that he was among the twenty-two faculty members terminated because he had received low student and administrative evaluations.

In response, plaintiff has filed the instant suit contending his dismissal constitutes a "termination for cause" under the guise of an employee lay-off. As such, plaintiff asserts, the procedure followed by LCC, lacking proper notice and opportunity for hearing, has violated his statutory, contractual and constitutional rights.

I. Teachers' Tenure Act

In Count I of his complaint, plaintiff asserted rights purportedly conferred by the Teachers' Tenure Act (TTA), MCLA 38.71 et seq: MSA 15.1967 et seq. Defendants have

countered by insisting through motion for accelerated judgment that, even if such rights apply to plaintiff, the court is without jurisdiction to adjudicate them. Whether plaintiff is a "certified" and "tenured" teacher within the purview of the TTA is a difficult question. See Shaw v Macomb Community College, 389 Mich 69; 204 NW2d 129 (1973). However, it is a question which This Court need not address. Even if, arguendo, plaintiff is a tenured teacher and does have rights under the TTA, the proper forum for vindication of such rights is the State Tenure Commission, not the circuit court. Review of TTA rights by This Court is available only after administrative remedies have been exhausted before the commission.

Because tenure commission review is available to a tenured teacher discharged by the board, the doctrine of exhaustion requires resort to this remedy before the case is reviewable in circuit court. Elgammal v Macomb Board of Education 83 Mich App 444, 449; 268 NW2d 679 (1978). Plaintiff maintains, however, that his rights under the TTA are not his exclusive remedy. Citing Shippey v Madison District Schools, 55 Mich App 663; 223 NW2d 116 (1974), plaintiff argues that he need not exhaust his remedies before the tenure commission since his complaint also includes a breach of contract claim. While incontestably good law, the Shippey holding is inapposite. It states simply that the TTA

does not deprive the circuit courts of jurisdiction to decide a breach of contract dispute. That a circuit court may have jurisdiction over a contract claim, however, does not confer jurisdiction over a parallel claim asserting rights under the TTA. In fact, the Shippey court itself said as much, holding that "the circuit judge properly concluded that he lacked jurisdiction to consider amy claim under the teacher's tenure act." Id. 5 Mich App 668. This Court is in full agreement.

Accordingly, defendant's motion for accelerated judgment as to plaintiff's TTA claim is granted for the reason that plaintiff has failed to exhaust his administrative remedies, thereby leaving This Court without jurisdiction.

II. Collective Bargaining Agreement

In Counts II,III,IV and V of his complaint, plaintiff has alleged that the procedure utilized in dismissing him violated several provisions of the governing collective bargaining agreement. In seeking accelerated judgment as to these contract claims, defendant contend that judicial consideration is premature because the contractual grievance procedures, culminating in compulsory arbitration, have not yet been completed. Again, the issue is whether plaintiff can properly seek redress in circuit court with respect to rights for which alternative methods of dispute resolution have been provided, in this instant agreement of the parties.

Plaintiff has not suggested that the alleged

infringements of contractual rights are not properly arbitrable. Rather, plaintiff contends he need not exhaust such remedies before proceeding in circuit court because his complaint includes a constitutional claim, which can be adjudicated only in court. Kewin v Board of Education of Melvindale-Northern Allen Park Public Schools, 65 Mich App 472, 478; 237 NW2d 14 (1975):

> Even if the Board's action could also give rise to a grievance under the contract, the exhaustion doctrine wold be inapplicable to her constitutional claim. The mere fact that the same conduct is violative of both the constitution and the contract should not deny plaintiff immediate access to the court on her constitutional claim.

Here, as in Kewin, plaintiff argues, the same course of action by defendants has given to both contractual and constitutional claims. Assuming that a valid constitutional claim has been stated, of which the Court must take cognisance, and over which the Court alone has jurisdiction, plaintiff asserts the purposes of the exhaustion doctrine would not be served by accelerated dismissal of his contractual claim. After all, the argument goes, if the court must adjudicate the contractual claim at any rate, why not also adjudicate the contractual claim arising out of the same transaction? Would not the cause of judicial economy be frustrated rather than advanced by splitting the cause of action?

The argument is appealing, but not persuasive. It is defective in at least one important respect: plaintiff's consti-

tutional claim is not yet "ripe" for judicial review. Further, it will not be ripe until the contractual grievance procedures are exhausted. This conclusion is an unavoidable function of the nature of plaintiff's constitutional claim.

The theory of plaintiff's constitutional claim is that his dismissal represented deprivation of a property interest without due process of law, in violation of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 17 of the Michigan Constitution of 1963. Based on Board of Regents v Roth, 408 US 54; 92 S Ct 2701; 33 L Ed 548 (1972) and Perry v Sinderman, 408 US 593; 92 S Ct 2694; 33 L Ed 2d 570 (1972), plaintiff has argued forcefully that he had a legitimate claim of entitlement to continuing employment at LCC. This legitimate claim of entitlement is said to have constituted a property interest, of which plaintiff could properly be deprived only upon due process of law. It is plaintiff's position that, under the circumstances attending his dismissal,due process required, at minimum, appropriate notice and opportunity for hearing prior to his termination.

There is without question some support for plaintiff's position. Board of Regents, v Roth, supra. The support is not conclusive, however. In Rockwell v Crestwood School District, 393 Mich 616, 633-634; 227 NW2d 736 (1975), the Michigan Supreme Court provided the following guidance regarding the mandates of due process:

> When the government seeks to deprive a person of a property right and we accept arguendo, that a teacher's statutory rights under the teacher's tenure act constitute property - due process requires a "hearing appropriate to the nature of the case." Mullane v Central Hanover Bank and Trust Co. 339 US 306, 313; 70 S Ct 62; 94 L Ed 86 (1950)"The formality and procedural requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." Boddie v Connecticut, 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 1970). "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." Arnette v Kennedy, 416 US 134, 155; 94 S Ct 1633; 40 L Ed 2d 15, 34 (1974). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v McElroy, 367 US 886, 8; 81 SCt 1743; 6 L Ed 2d 1230 (1961).
>
> in its most recent expression on the subject the Supreme Court in Arnette v Kennedy, supra., rejected a due process challenge to a statute allowing the discharge of a Federal employee without a pre-disciplinary evidentiary hearing. A variety of rationales were espoused, but the uniform thrust of each opinion, including the dissents, is that the constitutional necessity of a pre-disciplinary hearing must be determined by balancing the competing interests of the government and the employee.

Clearly, due process is a flexible concept, its parameters to be defined on a case-by-case basis. It requires simply that a hearing be held "at a meaningful time and in a meaningful manner".Armstrong v Manzo, 380 US 545, 552; 85 SCt 1187;

14 L Ed 2d 62 (1965).

Plaintiff would have This Court determine that the procedure whereby he was dismissed was defective because he was not afforded an opportunity for hearing at a meaningful time The procedure claimed to be defective, however, has not yet reached finality. Pursuant to the contractual grievance procedures, of which plaintiff has availed himself, plaintiff is entitled to several informal "hearing" and finality, arbitration. Although these protective measures are available only after the fact of dismissal, it cannot be said at this point that they are not meaningfully timely. Clearly, post-dismissal hearings are not untimely per se. Arnette v Kennedy, supra. Whether the hearings held pursuant to the grievance procedures fail to meaningfully protect plaintiff's rights, is properly ascertainable only after those hearings have been held. Plaintiff's constitutional claim is, therefore, premature. Moreover, the constitutional claim may even be rendered moot since the grievance procedures, if allowed to run their course, may yield precisely that relief sought by plaintiff.

In holding that the Court may not properly address plaintiff's constitutional claim at this time, the Court does not purport to pass judgment on the merits of the claim. Certainly, if plaintiff is still aggrieved by the LCC action upon completion of arbitration, he may then renew his con-

stitutional claim. At this juncture, however, since the constitutional claim is not to be addressed by This Court, there is no reason not to invoke the exhaustion doctrine regarding plaintiff's contractual claim. Requiring plaintiff to exhaust the available grievance procedure will not only effectuate judicial policy favoring arbitration where appropriate, but will also preserve the integrity of the parties' contractual agreement, while perhaps rendering judicial resolution unnecessary. Accordingly, defendant's motion for accelerated judgment as to plaintiff's contractual claim, stated in Counts II, III, IV and V of the complaint, is granted.

Further, to the extent that plaintiff's complaint states a claim for violation of due process rights, it is dismissed, because its immaturity deprives This Court of subject matter jurisdiction, a fact which This Court may raise sua sponte Fox v Board of Regents of the University of Michigan, 375 Mich 238; 134 NW2d 146 (1965).

III. Tort Claim

Plaintiff's complaint, at Count VI, states a rather nebulous claim in tort. The language of the complaint indicates that plaintiff has attempted to any combination of three distinct tort claims: negligence, intentional infliction of emotional distress, and defamation. As This Court considers Count VI pursuant to defendant's motion for summary

judgment under GCR 1963, 117.2 (1), it is bound to view the pleadings in the light most favorable to plaintiff. Thus, the Court here evaluates the legal sufficiency of each of those three claims which plaintiff may have attempted to plead.

A. Negligence Claim. By alleging that defendants breached various duties, plaintiff ha intimated a simple negligence claim. defendants have asserted in response that plaintiff's negligence action against LCC is barred by governmental immunity. The foundation of governmental immunity in Michigan is established by MCLA 691.1407; MSA 3,996(107):

> Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed.

This Court is persuaded by those authorities cited by defendants that LCC, as a "political subdivision", is a governmental agency See MCLA 389.1 et seq; MSA 15.615 (101) et seq 691.1401(b); MSA 3.996 (101)(b), and Doan v Kellogg Community College, 80 Mich App 316; 263 NW2d 357 (1980). The Court is likewise satisfied that operation of a public community college is a governmental function. Holzer v

Oakland University, 110 Mich App 355; 313 NW2d 124 (1981), Lee v Highland Park School District, 118 Mich App 305; 324 NW2d 632 (1982). Plaintiff has not disputed either of these propositions and has not pleaded facts in avoidance of governmental immunity. Hence, This Court finds that LCC is protected from liability for negligence by governmental immunity. To the extent that plaintiff's complaint purports to state a negligence cause of action, defendant LCC is entitled to summary judgment for the reason that plaintiff has failed to state a claim upon which relief can be granted.

As to whether the Board of Trustees and individual named defendants are similarly protected, the test is somewhat different.

> Two separate tests have evolved for determining whether individual employees of an agency engaged in a governmental function are protected by the cloak of immunity. One test looks only to whether the individual defendants were acting within the scope of their employment. If so, they are entitled to the protection of governmental immunity. See Gaston v Becker, 111 Mich App 692, 699; 314 NW2d 728 (1981); Shwary v Cranetrol Corp, 119 Mich App 736; 326 NW2d 627 (1982). The other test provides immunity where the individual was fulfilling a discretionary as opposed to a ministerial duty. Cook v Bennett, 94 Mich App 93; 288 NW2d 609 (1979); Willis v Nienan, 113 Mich App 30; 317 NW2d 273 (1982)

Here, the conduct complained of is the manner in which the Board of Trustees and its members determined

that plaintiff would among those faculty members whose contracts would not be renewed. Plaintiff complains that defendants' decision to dismiss him was arbitrary and impugned his professional competence. By acting arbitrarily and in willful violation of his contractual and statutory rights, plaintiff argues, defendants breached their duty to treat him in a manner which would not subject him to emotional distress and public humiliation.

The language of Count VI itself indicates clearly that the conduct complained of constituted an exercise by defendant of discretionary authority within the scope of employment. By alleging that defendants acted arbitrarily, plaintiff has, in effect, alleged an abuse of discretion as the basis for his negligence claim. And certainly, it is difficult to envision a task that would involve more discretion than a forced staff reduction. Further, it can hardly be argued but that such task was undertaken by defendants in the course of employment. This Court is persuaded, therefore, that whether the "scope of employment" test or the "discretionary v ministerial" test be applied, defendants are entitled to governmental immunity. There is no factual development based on these pleadings which even when viewed in the light most favorable to plaintiff, could possibly justify recovery for negligence. Accordingly, summary judgment is granted in

favor of the Board of Trustees and individual defendants with respect to plaintiff's negligence claim.

B. Intentional Infliction of Emotional Distress

Plaintiff has also alleged in Count VI that the Board of Trustees, acting through David Froh, inflicted emotional distress upon plaintiff through statements made to the press. Paragraphs 51 and 52 of Count VI state as follows:

> 51. Defendant, Board of Trustees member, acting in that capacity, David Froh, made public statements to the press impugning plaintiff's competency and the competency of two of his colleges by citing that it was "obvious" which faculty should be laid off; that "the criteria we applied objectively in each case," which they were not, and that low student evaluations were an important factor in the final decision of whom to terminate.
>
> 52. That Defendant Board of Trustees member David Froh, and other Defendant administrators, knew or should have known that an intentional breach of Plaintiff's employment contract, the violation of his Board of Trustees granted Tenure Rights, his Teacher Tenure Rights, and the accompanying statements (paragraph 51, above) impugning his professional competence would result in emotional distress. That such arbitrary actions did, in fact, result in mental distress and public humiliation.

Although governmental immunity does not bar an action for intentional tort, Lockaby v Wayne County, 406 Mich 65; 276 NW2d 1 (1979), defendants maintain nonetheless, their motion for summary judgment, that has failed to state a

claim for emotional distress upon which relief can be granted. This Court agrees.

A fundamental element of an action for intentional infliction of emotional distress is "extreme and outrageous conduct" by the defendant. In this regard, Michigan courts have adopted those standards enunciated in 1 Restatement Torts, 2d. Ledsinger v Burmeister, 114 Mich App 12; 318 NW2d 58 (1982) Section 46, comment d, p 73 of the Restatement states:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous:" The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Applying this definition, the Court finds as a matter of law that the conduct here alleged to have caused emotional distress is not, by any stretch of the imagination, extreme and outrageous. Defendants' motion for summary judgment as to [plaintiff's claim for intentional infliction of emotional distress is therefore granted.

C. Defamation. It is conceivable that plaintiff has also

attempted to state a cause of action for defamation in paragraph 51. of Count VI, supra. A communication is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter others from associating with him Nuyen v Slater, 372 Mich 654; 127 NW2d 369 (1964) In assessing whether language is defamatory, a communication is accorded that meaning which is most natural and is actually fairly accepted under the particular circumstances. Ledsinger v Burmeister, 114 Mich App 12, 21; 318 NW2d 558 (1982). Further, a communication cannot be defamatory unless it is untrue. Potsill v Booth Newspapers, Inc., 118 Mich App 608; 325 NW2d 511 (1982).

The only communication alleged in paragraph 51 which could possible be construed as defamatory are David Froh's alleged statements that "low student evaluations were an important factor in the final decision of whom to terminate" and "it was obvious which faculty should be laid off". However, plaintiff has not even alleged that these statements are false, thus neglecting an important if not essential, element of his defamation claim.

Now do the pleaded facts overcome the qualified privilege asserted by defendant. In Potsill v Booth Newspapers, Inc. supra., the Court of Appeals reaffirmed the long-standing rule of qualified privilege:

> [A] qualified privilege exists for "all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty." Id, 118 Mich App 621, quoting Bacon v Michigan Central Railroad Co., 66 Mich 166, 170; 33 NW 181 (1887).

This definition appears to have been "tailor-made" for the instant case. Both Mr. Froh and the reporter to whom he made the statement had legitimate and corresponding interests and duties regarding the dismissal of faculty members. Yet the privilege afforded by this relationship of interests and duties is a qualified privilege. It is not available to one who makes a false statement with common law malice, ill will or bad faith. Potsill, supra., 118 Mich App 621. Plaintiff has neither alleged falsity nor facts from which the court could infer that the statements were made with malice. In Nuyen v Slater, supra., the Michigan Supreme Court evaluated a similar situation:

> Where a qualified privilege exists there is a presumption of good faith. In Konkle v Haven, 140 Mich 472, 478, the Court stated:
>
> "The presumption in cases of privileged communications is that the person acts in good faith and from proper motives. If there is anything in the alleged libelous article or in the surrounding circumstances which shows a bad or vindictive spirit or a feeling or hatred or ill will, the question belongs to the jury. If there is not, it belongs to the court, as a question of law."

The same principle was commented upon in Raymond v Croll, 233 Mich 268, 275, 276, wherein it was said:

> "To overcome the presumption of good faith the circumstances must be such as to show that the defendant was actuated by a bad motive, which led to take advantage of the occasion to injure the plaintiff. The court should not permit dishonesty of purpose to be lightly inferred from acts which are just as consistent with good faith as with bad faith. If the circumstances relied upon as showing malice are as consistent with its nonexistence as with its existence, the plaintiff has not overcome the presumption of good faith, and there is nothing for the jury." Id, 372 Mich 660.

Plaintiff's general conclusory allegations that the Board of Trustees, through David Froh, acted maliciously, is not sufficient to overcome the presumption of good faith which attaches to defendant's qualified privilege. Id, 372 Mich 661.

Plaintiff's defamation claim thus lacks essential elements and cannot survive defendant's motion for summary judgment. The defamation claim is therefore dismissed.

Counts I through V of plaintiff's complaint are hereby dismissed pursuant to GCR 1963, 116, because the claims therein stated are, for various reasons, not yet "ripe" for judicial consideration. The Court's holding does not prejudice plaintiff's right to seek judicial relief in the future if, upon exhaustion of administrative and contractual remedies, plaintiff should still be aggrieved.

As to Count VI of the complaint, summary judgment

is granted in favor of all the defendants pursuant to GCR 1963, 117.2(1). The factual basis for the tort claim, whatever its nature, appears to have been non-existent and, in any case, was not pleaded.

IT IS SO ORDERED

Dated: March 9, 1984

S/_____
Robert Holmes Bell,
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DAVID ARGANIAN,

Plaintiff,

V.

LANSING COMMUNITY COLLEGE, THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, PHILIP J. GANNON, President and SAM KINTZER, Divisional Dean, Lansing Community College,

Defendants.

_____/

At a session of said Court held in the Circuit Courtrooms, County Building, city of Mason, Ingham County, Michigan on the 15 day of February, 1984.

Present: Hon. Robert Holmes Bell, Circuit Judge.

Defendants having filed a motion for accelerated judgment on counts I-V and a motion for summary judgment on Count VI of the First Amended Complaint filed by Plaintiff, and said motion having further prayed that an order be entered staying discovery or any other proceedings in this cause until such time as a decision is made on said motions, and subsequent to the filing of said motions, Plaintiff's counsel having served upon Defendants' counsel notices of taking depositions, requesting the appearance of two of the Defendants and two other employees of Lansing

Community College at the offices of the Plaintiff's attorney; and Defendants having filed a Motion to Stay Discovery, a hearing on which was held before this Court on February 8, 1984; and the Court being well advised in the premises;

IT IS HEREBY ORDERED that all discovery, including, but not by way of limitation, the taking of the depositions of the persons named in the notices heretofore served, be and is hereby stayed, pending a decision upon Dependants' motions for accelerated and summary judgment.

IT IS FURTHER ORDERED that in the event it becomes necessary to take depositions following the Court's decision on the aforesaid motions, said depositions shall be taken at a time, date and neutral place to be agreed upon by counsel for both parties.

S/_____
ROBERT HOLMES BELL
Circuit Judge

attest:
BETTY J. ST. JOHN

APPROVED AS TO FORM
S/_____
Joseph A. Warren
Attorney for Plaintiff

Dated: February 12, 1984

Lansing Community College
419 N. Capitol Ave., Box 40010
Lansing, MI 48901

July 22, 1983

Mr. David Arganian
716 Ann Street
East Lansing, MI 48823

Dear David:

At the Board of Trustees meeting on July 22, 1983, a Plan to balance the College's budget was adopted by the Board of Trustees. In achieving this objective, the Board decided, in part, to reduce staff. Unfortunately, you were among those individuals whom the College found it necessary to dismiss as a part of its staff reduction.

Pursuant to the College's agreement with the Lansing Community College Chapter of the Michigan Association for Higher Education (MAHE), you are hereby given notice that forty-five (45) calendar days hereafter your employment by the College will cease. We regret this action is necessary, but believe the best interests of the College dictate this course of action.

We trust you will discuss with your divisional or departmental head the details of completing your assignment with the College.

Very truly yours,
S/
Ronald E. Dove
Director of Personnel
/TV

Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALLIE ELIZABETH JOHNSTON-TAYLOR, et al.,

Petitioners,

v.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PATRICK R. HOGAN
REID & REID
One Business & Trade Center
200 Washington Square, North
Lansing, Michigan 48933
(517) 487-6566

ROBERT C. CLAUS
Counsel of Record
PAUL F. GLEESON
THOMAS G. HANCUCH
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 North LaSalle Street
Chicago, Illinois 60601
(312) 609-7500

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that there existed no genuine issue of material fact when Respondents relied on three education-related criteria, and not race, in selecting two employees for layoff?

2. Whether the Court of Appeals properly affirmed the entry of summary judgment for Respondents on Petitioners' procedural due process claim when, prior to the termination of their employment, both employees were told of the reasons for their selection and given a meaningful opportunity to respond?

3. Whether the Court of Appeals correctly concluded that a conflict in testimony concerning one pre-termination meeting did not require reversal of summary judgment for Respondents on the procedural due process claim where the undisputed evidence showed that a second pre-termination meeting satisfied all constitutional requirements?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The College's Budgetary Crisis	3
B. The Selection of Arganian and Taylor	4
C. Pre-Termination Notice and Opportunities to Respond	5
D. Post-Termination Arbitration Hearing	6
E. Proceedings in the District Court and Court of Appeals	7
REASONS WHY THE PETITION SHOULD BE DENIED	10
A. The Equal Protection Issue Petitioners Belatedly Raise Is Unsupported in the Record and Was Properly Rejected as Being Without Merit	10
B. Petitioners' Procedural Due Process Argument Relies Upon the Mistaken Factual Premise that Racial Preferences Were Used in the Selection of Arganian and Taylor and Thereby Seeks Review of an Issue Unsupported by the Record	12

C. The Lower Courts Correctly Concluded that Conflicting Testimony About Arganian's First Pre-Termination Hearing Was Insufficient to Create a Genuine Issue of Material Fact Given the Undisputed Evidence About the Second Pre-Termination Hearing 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	15
Graham v. Richardson, 403 U.S. 365 (1971)	11
Green v. Johnson, 977 F.2d 1383 (10th Cir. 1992)	12
King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992)	12
Loudermill v. Cleveland Board of Education, 470 U.S. 532 (1985)	13
Mathews v. Eldridge, 425 U.S. 319 (1976)	13
McDonald v. City of West Branch, 466 U.S. 284 (1984)	14
United States v. Johnson, 268 U.S. 220 (1925)	14
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	10

Statutes and Court Rules	
42 U.S.C. § 1983	14
Supreme Court Rule 10.1(a)	10, 12

No. 92-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALLIE ELIZABETH JOHNSTON-TAYLOR, et al.,

Petitioners,

v.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Board of Trustees of Lansing Community College (the "College") and Philip J. Gannon, the College's former President, submit this Brief in Opposition to the Petition for Writ of Certiorari. The principal legal issues raised by the Petition rely upon the unsupported premise that racial preferences were used in selecting Edward Taylor and David Arganian for layoff. However, the courts below correctly concluded that there existed no genuine issue of material fact that the layoff selections were based, not upon race, but upon (a) performance evaluations, (b) enrollment trends, and (c) the

ratio of full-time to part-time faculty within departments. The courts below also found no genuine issue of material fact that Taylor and Arganian were given constitutionally adequate pre-termination notice of these factors and an opportunity to respond. Thus, the Petition attempts to raise issues unsupported by the record, raises no question meriting review, and should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition's "Constitutional and Statutory Provisions Involved" section incorrectly lists the Equal Protection Clause of the Fourteenth Amendment. Because no equal protection claims were raised in Petitioners' Complaint, none are involved here.

The Complaint, which Petitioners have never sought to amend, contains only two counts raising constitutional claims [R.1].[1] Count I alleges that the College's 1983 layoff of Arganian and Taylor violated their substantive and procedural due process rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Count II alleges that Taylor was selected for layoff in retaliation for exercising his rights under the First Amendment.[2] Counts III and IV allege violations of Michigan state statutes.

---

[1] "R.____" refers to the document number listed on the District Court docket sheet filed with the Court of Appeals. "Tr. Vol. ____, p. ____" refers to the volume and page number of the transcript [R.196-98] from the evidentiary hearing conducted on March 14, 15 and 25, 1991. The exhibits admitted into evidence at the hearing [R.216-26] are referred to as "Jt. Ex. ____," "Def. Ex. ____," and "Pl. Ex. ____." References to "App. ____" are to pages in Appendices I and II to the Petition for Writ of Certiorari.

[2] The Petition seeks no review of the entry of summary judgment for Respondents on Count II.

The Complaint contains no reference to racial preferences or discrimination, or to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

After lengthy discovery, the District Court entered summary judgment for Respondents on Petitioners' procedural and substantive due process claims [App. II 49a-82a]. A panel of the Sixth Circuit Court of Appeals subsequently remanded these claims to the District Court to allow Petitioners to augment the factual record [*Johnston-Taylor I*, App. I 11a-23a].

Following a three-day evidentiary hearing, the District Court again granted summary judgment to Respondents (App. I 24a-46a). On Petitioners' second appeal, the same panel of the Sixth Circuit Court of Appeals affirmed the summary judgment order in an unpublished, per curiam decision [*Johnston-Taylor II*, App. I 2a-10a]. The Sixth Circuit subsequently denied Petitioners' petition for rehearing and for rehearing en banc [App. I, 1-a].

In the face of the rigorous and meticulous judicial scrutiny applied below, Petitioners now seek review relying on a constitutional ground never alleged in the Complaint, advancing an erroneous and misconceived theory of "strict scrutiny," and grounding their arguments on unsupported and immaterial facts. The pertinent facts are set forth below.

A. The College's Budgetary Crisis

The 1983 layoff of Arganian and Taylor (and 20 other College employees) was prompted by a serious budget shortfall. As the District Court correctly observed, the exist-

ence of "the budget shortfall and the steps taken by the [College] to address the shortfall was not rebutted" by Petitioners [App. I 45a].

In April 1983, the College faced a budget deficit of $2,331,000 for the fiscal year beginning July 1, 1983. Despite draconian cost-cutting measures, the deficit exceeded $343,000 at the end of the 1982-83 fiscal year, and the College's chief accrediting agency warned that expenditures had to be reduced further. Accordingly, the College concluded that it needed to reduce staff to balance the budget [Tr. Vol. I, p. 48; Tr. Vol. II, pp. 213-215; Jt. Ex. 1, pp. 232-35].

B. The Selection of Arganian and Taylor

The dean of each College division was provided with a 14-point list of criteria, agreed upon by the College and its five employee unions. The dean of each division was responsible for identifying the individuals within the division who should be recommended for layoff [Tr., Vol. II, pp. 231-232; Pl. Ex. 7, pp. 38-39].

Arganian and Taylor taught in the Division of Arts & Science, headed by Dean Sam Kintzer [Tr. Vol. II, p. 233]. Kintzer, like the other division deans, chose the criteria most relevant to his division [Tr. Vol. II, pp. 231-32]. The criteria selected differed from one division to the next, depending on each division's needs [Tr. Vol. II, pp. 231-32, 238-44, 306].

Dean Kintzer determined that the criteria most relevant to his division were (1) declining enrollment in specific programs over a three-year period, (2) ratio of full-time to part-time faculty, and (3) performance evaluations over the prior three years [Tr. Vol. II, pp. 232-42; Def. Ex. W, pp. 24-26]. Applying those criteria, Kintzer recommended

the layoff of three individuals: Arganian from Humanities, Taylor from Social Science, and John Manion from Communications [Tr. Vol. II, p. 238]. Manion, a minority group member (Asian/Pacific Islander), was subsequently saved from layoff by the resignation of a faculty member from a different department whose position Manion was able to fill [Tr. Vol. II, pp. 238-40].

The recommendations of Dean Kintzer and the other deans were referred to the Board of Trustees, which approved the layoffs on July 22, 1983, to become effective 45 days later on September 6, 1983 [Jt. Ex. 1, pp. 24-38 (7-22-83 minutes); Tr. Vol. II, pp. 251-52, 255; App. II 120a].

C. Pre-Termination Notice and Opportunities to Respond

On July 22, 1983, written notices were sent to Arganian, Taylor, and the 20 other employees selected for layoff, advising them that the Board of Trustees had voted to lay them off in an effort to balance the budget. The notices stated that the layoffs would not become effective for 45 days [App. II 120a; Jt. Ex. 5, p. 28].

During that 45-day period, College officials conducted several meetings with Arganian and Taylor. At each meeting Arganian and Taylor were provided with the reasons they had been selected for layoff and an opportunity to respond.

1. On July 25, 1983, Arganian met with his department chairperson, Joseph Anderson, who cited the three factors used to select Arganian for layoff [Tr. Vol. I, pp. 155-157; Def. Ex. X, pp. 181-182]. Arganian did not claim that the criteria had been misapplied, but said that these were not appropriate criteria for selecting faculty for layoff [Tr. Vol. I, pp. 155-156; Def. Ex. X, p. 182].

2. Two days after Arganian's meeting with Anderson, Arganian and his attorney met with Ron Dove, the College's Director of Personnel, and discussed the layoff [Tr. Vol. I, pp. 157-167, Vol. II, pp. 249-53; Def. Ex. X, pp. 182-185]. Although there is some dispute about exactly what was said in this meeting, neither Arganian nor his attorney asked for any additional information or further meetings [Tr. Vol. III, pp. 430-432].

3. The same day, July 27, 1983, Dove met with Taylor. Taylor admitted that Dove "started to tell me why" he had been selected for layoff but "I told him I really didn't want to hear it" [Def. Ex. V, p. 253; Tr. Vol. II, pp. 253-56, Vol. III, p. 379]. Taylor did not ask Dove for further information or for another meeting [Tr. Vol. II, p. 255].

4. On August 25, 1983, a hearing was held on Arganian's and Taylor's union contract grievances protesting their layoff [Tr. Vol. I, pp. 202-04; Vol. II, pp. 256-57, 261-68, Vol. III, pp. 433-44; Def. Exs. Q and R]. Dove presented the specific reasons and findings that led to the selection of Arganian and Taylor for layoff, including the exact numbers and percentages used in Dean Kintzer's application of the selected criteria [Tr. Vol. II, pp. 265-67, 342-43]. Both Arganian and Taylor were provided with an opportunity to respond and to question Dove about the reasons for their layoff [Tr. Vol. II, pp. 266-68].

On September 6, 1983, after all the meetings described above, the employment of Arganian, Taylor, and the 20 other employees selected for layoff was terminated [Tr. Vol. I, pp. 162-63, Vol. II, pp. 247, 255; App. 120a].

D. Post-Termination Arbitration Hearing

Two additional grievance hearings were conducted before Arganian's and Taylor's grievances were submitted

to binding arbitration [Def. Ex. T; Tr. Vol. II, pp. 260-61, 268, 271]. Following a four-day adversary hearing and the filing of post-hearing briefs, Arbitrator Howard Cole issued a 28-page decision denying the grievances of both Arganian and Taylor. Arbitrator Cole concluded:

> [T]he administration's layoff selections reflected good faith managerial judgments reached after due consideration of all relevant and contractually legitimate factors (including the mutually agreed upon criteria listed in the July 8, 1983 memorandum) and without reliance upon irrelevant or contractually illegitimate factors.

[Def. Ex. T, pp. 21-22].

E. Proceedings in the District Court and Court of Appeals

In July 1986, following issuance of the Arbitrator's decision, Petitioners filed a four-count Complaint [R.1] against the College's Board of Trustees and its President. Petitioners alleged that the layoff of faculty violated Arganian and Taylor's substantive and procedural due process rights (Count I); that Taylor was selected for layoff in retaliation for exercising his First Amendment rights (Count II); that Taylor's subsequent suicide was actionable under the Michigan Wrongful Death Act (Count III); and that Arganian and Taylor were selected for layoff because of their age in violation of Michigan's Elliot-Larsen Civil Rights Act (Count IV). The Complaint, which Petitioners never sought to amend, contains no reference to racial preferences, racial discrimination, or equal protection.

Following nearly three years of discovery, the District Court granted Defendants' Motion for Summary Judgment on April 25, 1989 [App. II 49a-82a]. The District Court held that Arganian and Taylor were not entitled to a pre-

termination hearing because the dismissals were part of an economically motivated reduction in force rather than "for cause." The District Court concluded that post-termination hearing procedures under the collective bargaining agreement satisfied the requirements of due process in this case [App. I 58a-69a]. The District Court also entered summary judgment for Defendants on Petitioners' substantive due process claim and Taylor's First Amendment claim, and dismissed the pendent state claims [App. II 69a-79a].

Petitioners appealed. The Sixth Circuit Court of Appeals held that even though Arganian and Taylor had not been discharged for misconduct, due process required they "not be discharged without receiving a hearing in which they are informed of the ground for their dismissal and given the opportunity to challenge the sufficiency of those grounds" [*Johnston-Taylor I*, App. I 21a]. The Sixth Circuit remanded the case for an evidentiary hearing on the issue of what pre-termination procedures, if any, had been provided. It also instructed the District Court to take additional evidence on Arganian and Taylor's substantive due process claims [App. I 22a-23a].

The District Court held a three-day hearing in March 1991, taking evidence concerning the College's financial crisis, the method by which the 22 employees were selected for layoff, the notice Arganian and Taylor received of the reasons for their layoff, and the opportunities they had to respond prior to termination of their employment. In a 20-page opinion, the District Court concluded that there were no genuine issues of material fact and that Respondents were entitled to judgment as a matter of law on Petitioners' procedural and substantive due process claims [App. I 24a-46a]. Again Petitioners appealed.

In an unpublished per curiam decision [*Johnston-Taylor II*, App. I 2a-10a], the Sixth Circuit affirmed the entry of summary judgment for Respondents on Petitioners' federal claims and dismissal of the pendent state law claims. Addressing Petitioners' procedural due process claim, the Court of Appeals stated that the "record developed at the evidentiary hearing on remand clearly reveals that [Arganian and Taylor] were given sufficient notice and opportunity to challenge the grounds for their lay-off prior to the effective date of the layoff" [App. I 9a]. Specifically, the appellate court noted that both received written notice of their impending layoff and an explanation that the basis for their layoff was a staff reduction due to a financial exigency; that within a week both met with the College's personnel director to discuss the reasons for their selection; and that both were given "a more elaborate pre-termination hearing" at the subsequent level-two grievance hearing [App. I 9a-10a].

The Sixth Circuit also affirmed the District Court's entry of summary judgment on Petitioners' substantive due process claims. In doing so, the appellate court ruled that the undisputed facts showed that the College faced exigent financial circumstances and that, contrary to the argument advanced by Petitioners, in selecting Arts & Science faculty for layoff there existed a rational basis for Dean Kintzer's "choice of three of the fourteen criteria" [App. I 10a]. The Court of Appeals also concluded that Petitioners' "equal protection and free speech arguments [were] without merit" [App. I 10a].

After Petitioners' request for a rehearing and a rehearing en banc was unanimously denied, Petitioners filed a petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Equal Protection Issue Petitioners Belatedly Raise Is Unsupported in the Record and Was Properly Rejected as Being Without Merit

Petitioners' chief complaint (Pet. 17) is that the Court of Appeals in *Johnston-Taylor II* "dismissed Petitioners' equal protection claim of a racial preference termination without any application on the record of the strict scrutiny analysis" required by *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Petitioners contend that certiorari should be granted and the Sixth Circuit ordered to set forth in more detail exactly why it concluded that Petitioners' equal protection argument was without merit [Pet. 17-22]. This contention raises no question meriting review or warranting exercise of this Court's power of supervision under Supreme Court Rule 10.1(a). Specifically, the contention is unavailing for three reasons.

First, Petitioners failed to raise their equal protection argument in a timely fashion. Unlike the nonminority teachers in *Wygant* who "brought suit . . . alleging violations of the Equal Protection Clause" (476 U.S. at 272), Petitioners' Complaint here [R.1] makes no mention of equal protection, affirmative action, or racial discrimination or preferences. The only form of discrimination mentioned in the Complaint, which Petitioners have never sought to amend, is the allegation that Arganian and Taylor were laid off because of their *age* in violation of Michigan law. [R.1, Complaint ¶¶ 88-89]. Indeed, in their briefs to the Sixth Circuit, Petitioners characterized their claim, not as a violation of equal protection, but as a "violation of substantive due process," apparently recog-

nizing that the pleadings raised no equal protection claim [*Johnston-Taylor II*, Plaintiff-Appellants' Brf. 27 and Reply Brf. 13-16].

Second, Petitioners' "racial preferences" argument finds no support in the record viewed as a whole. Petitioners, who raised the issue for the first time during oral argument before the Court of Appeals in *Johnston-Taylor I*, presented no probative evidence that racial preferences resulted in the selection for layoff of Taylor or Arganian. Indeed, it is undisputed that the third Arts & Science faculty member selected by Kintzer, John Manion, was himself a minority. Moreover, the only minority employee whom Petitioners could even arguably claim was "exempted" from layoff because of race, Tapera Chiwocha, was in fact retained because of his higher performance evaluations, not because of "racial preferences" [Tr. Vol. II, p. 241].[3] As the lower courts recognized, Petitioners' belated claim of racial preferences is a make-weight, unsupported by probative record evidence.

Third, Petitioners' contention that the Sixth Circuit "ignored" *Wygant* and other decisions addressing governmental preferences based upon race [Pet. 19] misconceives the concept of "strict scrutiny." The doctrine refers to the heightened standard applied by the judiciary in evaluating governmental classifications which are in fact based upon race. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). The doctrine does not, as Petitioners apparently contend, require a court to render a detailed written opin-

---

[3] The language from Dean Kintzer's deposition cited by Petitioners [Pet. 11] is not to the contrary. That testimony addresses what Kintzer was told by someone else, not the criteria Kintzer himself applied in recommending three Arts & Science faculty (one of whom was a minority group member) for layoff.

ion any time a party *alleges* that a governmental body has employed a racial classification.

This is particularly true where, as here, (a) the pleadings contain no equal protection claim [R.1], (b) the record provides no support for the belated assertion that a racial classification or preference was actually employed, (c) the claimants devoted only three pages of their 48-page appellate brief to the argument, and (d) even then, the argument was couched in terms of substantive due process, not equal protection. Under these circumstances, the Court of Appeals properly rejected Petitioners' equal protection argument as "without merit" [App. I 10a].

Indeed, summary rejection is a routine, if not required, method of disposing of unsubstantial or frivolous arguments in an era marked by excessive strains on the federal judiciary's resources. *See, e.g., King v. Innovation Books*, 976 F.2d 824, 833 (2d Cir. 1992) (we have "considered appellants' remaining arguments . . . and found them to be without merit"); *Green v. Johnson*, 977 F.2d 1383, 1391 (10th Cir. 1992) (same). Accordingly, the Sixth Circuit's rejection of Petitioners' untimely and unsupported equal protection argument cannot in any way be characterized as having "so far departed from the accepted and usual course of judicial proceedings" as to warrant the extraordinary exercise of this Court's "power of supervision" under Rule 10.1(a).

B. Petitioners' Procedural Due Process Argument Relies Upon the Mistaken Factual Premise that Racial Preferences Were Used in the Selection of Arganian and Taylor and Thereby Seeks Review of an Issue Unsupported by the Record

Petitioners' second "Question Presented" is whether procedural due process requires "pre- or post-termination

notice of the use of a racial preference" in the selection of public college faculty for layoff [Pet. i, 22-28]. This argument, like the first, relies upon the unsupported factual premise that "racial preferences" were used in selecting Arganian and Taylor for layoff. The courts below correctly concluded that there existed no genuine issue of material fact that the layoff selections were based, not upon race, but upon three objective, pedagogical criteria [App. I 7a-8a, 39a-40a]. Because this argument is unsupported by the record, it raises no question meriting review.

Petitioners' related assertion that the Sixth Circuit departed from existing Supreme Court precedent [Pet. 27] is also mistaken. Petitioners, citing *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), complain that the Sixth Circuit "did not apply any balancing test . . . in determining what pre-termination due process" Petitioners deserved [Pet. 27]. The Sixth Circuit did not explicitly discuss the *Mathews v. Eldridge*, 425 U.S. 319 (1976) balancing test in determining what process was due because, as the Sixth Circuit observed in *Johnston-Taylor I*, "the law is quite clear on this question" [App. I 21a]. Specifically, the Sixth Circuit stated that professors "with tenure or a continuing contract" may not be discharged without receiving a pre-termination hearing in which "they are informed of the grounds for their dismissal and given an opportunity to challenge the sufficiency of those grounds" [App. I 21a]; *cf. Loudermill*, 470 U.S. at 542-46 (applying balancing analysis and concluding that prior to termination a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story"). Thus, the Sixth Circuit's decision, rather than departing from existing Supreme Court precedent, simply recognized the well-settled state of the law on this issue.

Petitioners' reliance on *McDonald v. City of West Branch*, 466 U.S. 284 (1984), is simply inapposite. In *McDonald*, this Court held that an arbitration award under a collective bargaining agreement should not be afforded *res judicata* effect in a subsequent action under 42 U.S.C. § 1983. Unlike the lower court in *McDonald*, neither the District Court nor the Sixth Circuit in the present case held that Arbitrator Cole's award precluded Petitioners' federal claims under § 1983.

Finally, and apparently as an afterthought, Petitioners cite four lower court decisions, asserting that "no court" has approved the layoff of tenured faculty "when the alleged deficit is only 1.1%" of the school's budget [Pet. 28]. This substantive due process argument bears no rational relationship to the procedural due process issue raised in the "Question Presented."

Moreover, this argument is fact specific. Petitioners do not contend that the lower courts applied a different legal standard, thereby creating a split in the circuits. Rather, they argue that the lower courts misapplied that standard in rejecting Petitioners' substantive due process claim. In doing so, Petitioners in effect ask this Court to define, as a matter of substantive due process, the minimum budgetary deficit which will justify the layoffs of tenured faculty by a state-supported educational institution. Clearly, this honorable Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

C. The Lower Courts Correctly Concluded that Conflicting Testimony About Arganian's First Pre-Termination Hearing Was Insufficient to Create a Genuine Issue of Material Fact Given the Undisputed Evidence About the Second Pre-Termination Hearing

Petitioners' third "Question Presented" is whether Rule 56 of the Federal Rules of Civil Procedure "authorize a trial court to determine credibility on a motion for summary judgment" (Pet. i). The answer, of course, is "no." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, the Question Presented raises no important issue of federal law. The law is well-settled.

Moreover, a review of the record shows that the Sixth Circuit correctly applied this rule. The conflicting testimony regarding Arganian's first meeting with the College's Director of Personnel was clearly insufficient to create a genuine issue of material fact precluding summary judgment because there is no dispute that in the *second* pre-termination meeting with Arganian, Dove provided the specific reasons for Arganian's layoff, including the numbers and percentages used by Kintzer in the selection process [Tr. Vol. II, pp. 265-67, 342-43]. Procedural due process requires pre-termination notice of the reasons for the employee's dismissal; it does not require that the information be provided on two separate occasions. Thus, any dispute over the specificity provided in the first meeting was immaterial for purposes of Respondents' motion for summary judgment. *See Anderson*, 477 U.S. at 247-248 ("the mere existence of *some* alleged factual dispute will not effect an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original).

Petitioners' related complaint that the District Court abused its discretion in allowing Respondents to amend an interrogatory answer just prior to the evidentiary hearing [Pet. 30] provides no grounds for a grant of certiorari. The interrogatory answer was amended in accordance with Rule 26(e)(2) of the Federal Rules of Civil Procedure three days after Petitioners brought it to Respondents' attention [R.180, p. 5; R.185]. Moreover, Petitioners did not object that the amendment prevented them from preparing for the evidentiary hearing. Indeed, Petitioners specifically asked the District Court *not* to reschedule the hearing [R.183, p. 2]. Accordingly, the District Court's ruling that the amendment was seasonable [R.192] cannot be considered an abuse of discretion and provides no basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK R. HOGAN
REID & REID
One Business & Trade Center
200 Washington Square, North
Lansing, Michigan 48933
(517) 487-6566

ROBERT C. CLAUS
Counsel of Record
PAUL F. GLEESON
THOMAS G. HANCUCH
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
222 North LaSalle Street
Chicago, Illinois 60601
(312) 609-7500

Attorneys for Respondents

Supreme Court, U.S.
FILED
MAR 18 1993
OFFICE OF THE CLERK

NO. 92-1246

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JOHNSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, and LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS RESPONSE BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

Joseph A. Warren
1016 N. Washington
Lansing, Michigan 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
26316 Telegraph Rd.
P.O. Box 697
Flat Rock, MI 48134

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

TABLE OF CONTENTS

Reply Brief *p. 1*

TABLE OF AUTHORITIES

Whitsel v. Southeaster Local School District
484 F. 2d 1222 (6th Cir. 1973) p. 7

Wygant v. Jackson Board of Education
476 U.S. 267 (1986) *1, 5, 10*

U.S. Constitution Amendment XIV *3, 4, 5*

The facts of this case place two issues squarely before this Court. The first is whether Petitioners were entitled to pre-or post-termination notice of the use of race or affirmative action when they were terminated from their public employment as tenured faculty members, under the principles enunciated by this Court in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)? Secondly, does a due process analysis by a court, in a race based termination of tenured public employment, create an exception to the requirement of strict scrutiny judicial review of the use of race and affirmative under *Wygant, supra.*?

Respondents Brief has not challenged the clear and unequivocal testimony of Petitioner's dean that he was told, because of affirmative action, he was to classify people on the basis of race and exempt "blacks and other minorities" from termination.[1] Respondents have never articulated a reason or a need to apply an affirmative action override to terminating tenured faculty under an alleged reduction in force, as none exists. Nor have Respondents challenged the clear and unequivocal testimony of their own administrative agents on the use of race and affirmative action to select Petitioners for

[1] "The only exception would be that it was clear, because of affirmative action, **blacks and other minorities would not be laid off**." (Emphasis added) [Deposition of Sam Kintzer, p. 33]. This quote and the deposition testimony of the use of race to select Petitioners is fully discussed in Petitioners' Brief, pp. 9-14.

termination.

At no time were Petitioners informed by Respondents that their selection for termination was affected by an affirmative action. Five years after their terminations, Petitioners discovered that Respondents had used an undisclosed affirmative action override criteria to select them for termination, in addition to the three factors claimed by Respondents. The testimony cited in Petitioners Brief [pp. 9-14] presents a *prima facia* case of a race-based termination under the rubric of affirmative action. Respondents have never challenged the testimony of their own agents. Nor have Respondents answered why an affirmative action override was necessary. Respondents only state that a "minority" was selected,[2] and that Petitioner Arganian had lower evaluations than the less senior minority candidate for termination.[3]

---

[2] Respondents cite that the third person selected for termination was a Pacific Islander, and hence a minority. Respondents have failed to point out that under the college affirmative action policy, a Pacific Islander is not considered a minority any more than a person of Irish, Italian, German, Armenian, Slavic, etc., ethnic descent is considered a minority. [Respondents Brief p. 11].

[3] Respondents claim that Professor Arganian's evaluations were lower than Dr. Chiwocha's is unsupported by the record. Respondents have refused to divulge the data used by Dean Kintzer's to rank faculty for termination. The district court refused to rule on Petitioners two motions to compel production of the data.

Respondents base their defense on the assertion that a due process analysis of Petitioners' termination by the Court is sufficient to overcome any claim of race based termination, thus eliminating the need for strict judicial scrutiny of Respondents use of race and affirmative action. Respondents have failed to cite any authority that eliminates the need for strict judicial scrutiny whenever race and affirmative is used to terminate tenured public employment.

Respondents' claim that this Court should not grant certiorari because the issue of a race based termination under the Equal Protection Clause of the Fourteenth Amendment was not raised until after the Complaint was filed is defective for two reasons. First, Respondents failed to notify Petitioners of the use of race and affirmative action in the selection process to terminate them. Petitioners did not discover the use of race in their selection until five years after their termination, thus they could not have challenged it during any alleged due process "hearings" at the time of their terminations, nor base their Complaint upon this allegation.

Moreover, the alleged "hearings" cited by Respondents were not before Petitioner's Dean, who had selected them for termination under affirmative action, nor before the Board of Trustees, who actually voted to terminate them. At no time during the informal administrative grievance meetings,

which Respondents belatedly now claim were hearings,[4] were Petitioners ever notified that race and affirmative action had been use to select them for termination.

Additionally, Respondents, blocked by court order, any avenue of meaningful discovery in the immediate post-termination period [Appendix II pp. 118-119a]. Even at the arbitration of Petitioners' grievances, over a year later, Respondents did not inform Petitioners how race and affirmative had been a used in their selection for termination. This is why Petitioners' urge this Court to adopt a due process notice requirement whenever race and affirmative action is used to terminate tenured public employment.

Respondents' second defense to the Equal Protection claim is equally without merit. The district court and Sixth Circuit has had the question of the impermissible use of race before it both times it has ruled in this case. When the Sixth Circuit Court of Appeals reversed and remanded the district court's grant of Respondents' motion for summary judgment in July, 1990, Petitioners brought a motion for summary judgement on the impermissible use of race under an Equal Protection claim, and Respondents' unequivocal admission that they afforded Petitioners no pre-termination due process hearings. The district court refused to hear Petitioners motion and dismissed it, reaffirming its original grant of

[4] See footnote 5 for Respondents' admission.

Respondents motion for summary judgment. [Appendix **I** p. 48a].

Petitioners second appeal to the Sixth Circuit laid Petitioners' Due Process and Equal Protection claims squarely before the court. The Sixth Circuit rejected Petitioners claim of an unlawful race based termination, without a strict scrutiny analysis, as being "without merit." [Appendix **I**, p.10a].

Respondents justify their failure to give Petitioners of notice of the use of race to terminate them by claiming that Petitioners' received informal administrative grievance "hearings." Respondents are asking this Court to adopt a "totality of circumstances test" where race was used to terminated tenured public employment. This test would weaken the previous decisions of this Court where race and affirmative action was used to terminate employment, *Wygant, supra.*

The failure of Respondents to notify Petitioners that race and affirmative action was used in the process to select them for termination, and the failure of the Sixth Circuit and district courts to apply any strict judicial scrutiny to a race based termination, is the basis of Petitioners appeal to this Court.

Petitioners are asking this Court to hold that it is unconstitutional under the Equal Protection Clause of the

Fourteenth Amendment for Respondents to: 1). classify its tenured public employees by race, for the purpose of terminating only non-minority tenured employees; 2). fail to inform terminated tenured employees that race was used to select them for termination under this classification; 3). terminate tenured employees on the basis of race, under the rubric of affirmative action, in the absence of any compelling governmental interest; 4). claim a "totality of circumstances test" defense to an allegation of race based termination; 5). and to rule that the facts of this case do not provide an exception to the requirement that courts must apply strict judicial scrutiny when there is a claim of the use of race to terminate tenured public employees under affirmative action.

Respondents' claim that Petitioners received due process is also without merit. Petitioners never received due process because they were never informed of one of the essential underlying reasons for their selection for termination, i.e., race and affirmative action. No where do Respondents claim that they informed Petitioners of the use of race and affirmative action to select them for termination, yet Respondents own agents unequivocally testified as to the use of race in the selection process. The Due Process Clause of the Fourteenth Amendment cannot be satisfied if terminated tenured public employees are not given the reasons for their selection for termination and a meaningful chance to rebut

them either at a due process hearing or in a court of law.

Respondents have failed to inform this Court why, eight years after they terminated Petitioners, they repudiated their adamant and unequivocal admission that the college did not afford Petitioners pre-termination due process hearings.[5] On the eve of the evidentiary hearing in March 1991, Respondents reversed their entire defense and repudiated their previous admissions and sought to build a case upon actions they previously admitted that they did not take.[6]

The failure of the Sixth Circuit and the district court to consider this a disputed question of material fact precluding a grant of summary judgment may be due to the Sixth Circuit's lack of a standard of due process governing alleged economic reductions in force. The Sixth Circuit cited *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973), in its first opinion [Appendix I pp. 20-21a], and then rejected it in its second opinion [Appendix I p. 8a], as being the standard governing this case. The Sixth Circuit cited no other authority that it followed. The Sixth Circuit apparently

---

[5]. Interrogatory No. 59. "Neither the College nor its agents provided Plaintiff David Arganian or Edward Taylor a hearing prior to their layoff, **nor were they entitled to any such hearing prior to their layoff**." [Emphasis added] (Answers to First Set of Interrogatories R-128).

[6] See footnote 5.

looked to see if Petitioners met with some administrator at the college prior to their termination and concluded that they had a due process hearing.

None of the grievance meetings cited by Respondents and in the Sixth Circuit's opinion, met the minimum standards of a due process hearings under any authority in any other circuit governing the termination of tenured professors under a claim of financial exigency. The grievance meetings are deficient as "hearings" because they were not with the person who selected Petitioners for termination, nor the Board of Trustees, who actually terminated Petitioners. Petitioners were not given a statement of the reasons and data used to select them, nor a meaningful time to prepare a rebuttal, nor an appropriate hearing forum to challenge the existence of a financial exigency and their selection under it.

Instead, the Sixth Circuit held that first and second step grievance meetings with administrators who did not know why Petitioners had been selected (the department chairperson), and administrators that could not supply the documents and data used to select them (personnel director and college attorney), constituted pre-termination due process. The Sixth Circuit's holding that these meetings met the minimum standard of due process conflicts with all circuits that have reviewed termination of tenured faculty under an alleged claim of financial exigency. [Petitioners'

Brief, pp. 27-28].

Petitioners were afforded no post-termination hearings, aside from arbitration over a year after Petitioners were terminated. At the request of the Respondents, arbitration was limited to contractual grievance matters, and not the constitutional questions. The arbitrator refused to hear or rule on statutory or constitutional issues.

Respondents have admitted that they have never given Petitioner Arganian a due process hearing on the termination of his independent grant of tenure outside of the labor agreement. Respondents have never attempted to repudiate this admission. Yet, the district court twice granted Respondents' motion for summary judgment, in spite of Respondents admitting that they did not hold a due process hearing on his independent grant of tenure that Respondents demanded that the arbitrator not consider the issues surrounding Petitioner's independent grant of tenure at arbitration. It is an uncontested fact that Petitioner Arganian has never been afforded any due process on his independent grant of tenure.[7]

Petitioners urge this Court to grant certiorari to

---

[7] "Defendants admit that Plaintiff Arganian has never been notified by any officer or agent of LCC that his tenure has been terminated **nor has Arganian been afforded a hearing on his tenure rights prior to being terminated as a full-time professor**." [Defendants' Answer to Complaint, paragraph 22].

reaffirm a due process requirement under the principles of *Wygant, supra*. The facts of this case provide a compelling reason for a notice requirement and an appropriate vehicle for this Court to articulate the due process principles necessary to carry out this Court's mandate that race based, affirmative action, terminations be consistent with the principles and procedures contained in *Wygant, supra*. When compared to the loss of one's employment because of race, the burden on the employer to justify the use of race and affirmative action, with full and fair disclosure to the employee as to why and how race was used to select him, would be de minimums.

Respectfully submitted:

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney for Petitioners